

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEFFREY J. HEFFERNAN, :

4 Petitioner : No. 14-1280

5 v. :

6 CITY OF PATERSON, NEW :

7 JERSEY, ET AL. :

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9 Washington, D.C.

10 Tuesday, January 19, 2016

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:03 a.m.

15 APPEARANCES:

16 MARK FROST, ESQ., Philadelphia, Pa.; on behalf of
17 Petitioner.

18 GINGER D. ANDERS, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; for
20 United States, as amicus curiae, supporting
21 Petitioner.

22 THOMAS C. GOLDSTEIN, ESQ., Bethesda, Md.; on behalf of
23 Respondents.

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| | | |
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| 1 | C O N T E N T S | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | MARK FROST, ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | ORAL ARGUMENT OF | |
| 6 | GINGER D. ANDERS, ESQ. | |
| 7 | For United States, as amicus curiae, | |
| 8 | supporting the Petitioner | 19 |
| 9 | ORAL ARGUMENT OF | |
| 10 | THOMAS C. GOLDSTEIN, ESQ. | |
| 11 | On behalf of the Respondents | 29 |
| 12 | REBUTTAL ARGUMENT OF | |
| 13 | MARK FROST, ESQ. | |
| 14 | On behalf of the Petitioner | 59 |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 14-1280, Heffernan v. City of
5 Paterson, New Jersey.

6 Mr. Frost.

7 ORAL ARGUMENT OF MARK FROST

8 ON BEHALF OF THE PETITIONER

9 MR. FROST: Mr. Chief Justice, and may it
10 please the Court:

11 Public employees have a right not to be
12 demoted on patronage grounds. It does not matter if you
13 are affiliated with a specific party or that you are
14 nonaffiliated. It does not matter if you are mistakenly
15 perceived by your employer or supervisor that you're
16 engaged in political association to be protected by the
17 First Amendment.

18 JUSTICE KENNEDY: How would you define the
19 right at issue in this case?

20 MR. FROST: The -- the issue here is --

21 JUSTICE KENNEDY: How would you define the
22 right that your client wishes this Court to vindicate?

23 MR. FROST: I'm defining the right in that
24 pursuant to Elrod and its progeny, that there -- it is
25 not necessary to have any affirmative acts, that by

1 virtue of being a public employee, he has the right not
2 to engage in political association.

3 JUSTICE KENNEDY: Well, that's just a
4 restatement of -- of Elrod. I -- I -- would -- would --
5 would it be fair to the proposition that you are putting
6 before the Court to say that you're asserting the right
7 to be free from government inquiry into an oversight of
8 your views? Would that be a fair statement?

9 MR. FROST: That would be a fair statement,
10 Justice Kennedy.

11 JUSTICE KENNEDY: Because -- look, do we --
12 it sounds to me from the way you began your argument
13 that we take this case on the assumption that, if he had
14 picked up the sign, that if he had been supporting the
15 candidate for chief of police who was challenging the
16 incumbent, if he had been engaged in the activity, that
17 would be protected. He could not have been demoted.
18 If -- you want us to take the case on that -- do we have
19 to accept that proposition for you to prevail in this
20 case?

21 MR. FROST: No, you do not have to accept
22 that proposition. Proposition is just clearly that, as
23 a public employee, he has a right to either associate or
24 nonassociate, and he doesn't have to commit an
25 affirmative act in support, in this case, of the mayor's

1 opponent, which was Chief Spagnola.

2 CHIEF JUSTICE ROBERTS: Well, but the -- the
3 First Amendment talks about abridging freedom of speech,
4 and I thought the case came to us on the proposition
5 that he wasn't engaging in speech at all. That he was
6 not engaging in association, he was not engaging in
7 trying to convey a message, he was just picking up a
8 sign for his mother. And if that's the basis on which
9 the case comes to us, I'm not sure how he can say his
10 freedom of speech has been abridged.

11 MR. FROST: In this case, Mr. Chief Justice,
12 the case comes to us with respect to association. With
13 respect to speech, speech is governed by a different
14 doctrine than association. There is no need to do a
15 Pickering analysis in this case.

16 JUSTICE SCALIA: He wasn't associating with
17 anybody any more -- any more than he was speaking. He
18 was doing neither one.

19 MR. FROST: Justice Scalia --

20 JUSTICE SCALIA: He was associate --
21 associating with his mother, I suppose, in picking up
22 the sign for her. But he was not expressing any
23 political view. He was not associating with a political
24 party.

25 What case of ours vindicates the right

1 that -- that Justice Kennedy described to you and which
2 you readily agreed with? What -- what case of ours
3 vindicates that --

4 MR. FROST: Elrod would stand for that
5 proposition.

6 JUSTICE SCALIA: Elrod --

7 MR. FROST: Elrod --

8 JUSTICE SCALIA: Elrod says you have a First
9 Amendment right to favor a political party or not favor
10 a political party, and you cannot be fired for doing so.
11 That's not what happened here.

12 MR. FROST: But he was not favoring a
13 political party.

14 JUSTICE SCALIA: Exactly. He was not
15 expressing any First Amendment view whatever. I mean,
16 he was fired for the wrong reason, but there's no
17 constitutional right not to be fired for the wrong
18 reason. If he was fired because his -- his -- his
19 government employer thought he had committed a felony
20 and he hadn't, he might -- he might have a cause of
21 action under some statute. But there -- there --
22 there's no constitutional right not to be fired for the
23 wrong reason, and that's what happened here.

24 MR. FROST: There's a constitutional right,
25 Justice Scalia, to be able to be free from patronage

1 decisions and to be discharged or demoted on patronage
2 grounds. And in Elrod --

3 JUSTICE SCALIA: Where do we say that? We
4 never said that. Elrod and -- and Branti are -- are
5 cases decided under the First Amendment. The First
6 Amendment guarantees the right to freedom of speech and
7 freedom of association. Your client was neither
8 speaking nor associating. So how could he possibly have
9 a cause of action under the First Amendment?

10 MR. FROST: He doesn't need to speak, and he
11 doesn't need to take a position. The Rutan plaintiffs,
12 they didn't take a position with respect to promotion or
13 transfers. They took -- the fact of the matter is,
14 is -- is that since they were not affiliated with the
15 Republican party or supporting the Republican party or
16 endorsed by the Republican party, none of those
17 individuals would have been promoted or transferred.
18 They didn't take any affirmative acts.

19 JUSTICE ALITO: I mean, I don't
20 understand -- I don't understand your answer. What --
21 what expressive activity did he engage in? He wasn't --
22 he was not allegedly demoted for failing to support the
23 mayor. He was allegedly demoted for seemingly
24 supporting the mayor's opponent.

25 MR. FROST: In -- in Waters this Court

1 looked at the motive of the employer, the motive of
2 government. If government perceives that you are
3 engaging in a political activity and the motive is to
4 suppress one's beliefs and associations or
5 nonassociations, then you look at it through
6 government's analysis, and it's their basis of their
7 facts that you are evaluating.

8 Here they evaluated the facts that he was
9 engaged in campaigning.

10 Officer Heffernan went to a political
11 gathering. He went and picked up a sign. What was
12 misperceived by his employer was the fact of his intent.
13 He said that, I'm not intending to support Spagnola, but
14 he is doing all those incidents that are core First
15 Amendment activities.

16 CHIEF JUSTICE ROBERTS: Well, let me just --
17 to clarify what I -- how I thought the case was
18 presented. Let's say the employer comes in to Smith and
19 says, you know, Smith, I saw you getting a -- a -- a
20 political sign, and you're -- and you're -- you're
21 fired.

22 And Smith says, it wasn't me. I was off,
23 you know, in a different town then.

24 In other words, it's a pure mistake of fact.

25 Your answers, it seems to me, you try to get

1 advantage of the fact that there -- you could perhaps
2 have argued this was expressive activity. Say, oh, he
3 was at a meeting, a political event. He was getting a
4 sign. But your theory, I thought, didn't depend on that
5 at all.

6 MR. FROST: It --

7 CHIEF JUSTICE ROBERTS: It was simply a
8 mistake of fact.

9 And then -- now, can the person who wasn't
10 even there, can he bring a First Amendment challenge to
11 his dismissal?

12 MR. FROST: Yes, Mr. Chief Justice.

13 CHIEF JUSTICE ROBERTS: Okay.

14 MR. FROST: And the point that I was
15 making --

16 JUSTICE KENNEDY: And then again -- but it's
17 still not clear to me: What is the right that he's
18 asserting?

19 And -- and I'll back up while you're
20 thinking about that.

21 Is -- can a local government say that all
22 our employees must be neutral in campaigns and must not
23 take part in campaigns?

24 MR. FROST: Well --

25 JUSTICE KENNEDY: They can vote, but they

1 can't take part in campaigns? Like the Hatch Act?

2 MR. FROST: Well, there are Hatch Acts.

3 There was no provision here.

4 JUSTICE KENNEDY: Can the government insist
5 on neutrality?

6 MR. FROST: I think the government can have
7 a policy after balancing the interests between that of
8 the employer and that of the position.

9 JUSTICE GINSBURG: Is that an issue --

10 MR. FROST: I was not saying --

11 JUSTICE GINSBURG: Is that an issue -- is
12 that an issue in this case? Is there any allegation
13 that there was such a policy of neutrality that no
14 employee could engage in political activity?

15 MR. FROST: Okay. Justice Ginsburg, there
16 was no such policy in this case involving --

17 JUSTICE SOTOMAYOR: I'm sorry. I thought
18 there was an unwritten policy.

19 MR. FROST: There -- there was a policy that
20 Chief Wittig said that existed with respect to members
21 of his staff only. However, with respect to that
22 policy, there's no testimony regarding that policy. In
23 other words, the people that worked in the Chief's
24 office -- there were four individuals who were
25 officers -- none of them ever heard of that policy.

1 Also, that policy was never raised below in any of the
2 motions for summary judgment or the motion before the
3 Third Circuit twice. So we believe that that motion is
4 waived.

5 But to answer your question, Your Honor, is
6 the fact that no one knew of this policy. So -- so he
7 could say he had a policy and he could make reference to
8 it, but it's just not supported by any evidence in this
9 case.

10 CHIEF JUSTICE ROBERTS: Is there a remedy
11 for your client, apart from this action under the First
12 Amendment? Does he have civil service protections of
13 any kind or -- or -- I don't know -- collective
14 bargaining?

15 MR. FROST: Your Honor --

16 CHIEF JUSTICE ROBERTS: Let's just say:
17 What would happen if the boss comes in and says, you
18 know, for the -- you didn't turn off the lights last
19 night. You're fired.

20 Can he -- is there a way for him to say, I
21 was on leave yesterday. It wasn't me.

22 MR. FROST: Well, that's not a
23 constitutional violation for --

24 CHIEF JUSTICE ROBERTS: No, no. My point is
25 that maybe this shouldn't be a constitutional violation

1 if there are adequate remedies to address what may or
2 may not be a First Amendment issue.

3 MR. FROST: Mr. Chief Justice, there are --
4 there were no other remedies.

5 CHIEF JUSTICE ROBERTS: Okay.

6 MR. FROST: There is a -- State of
7 New Jersey has a State Civil Rights Act which mimics
8 1983. Just because there is a -- such a right, doesn't
9 mean that you can diminish the First Amendment and give
10 up your First Amendment rights. So clearly, we
11 proceeded with the fact that there was a violation of
12 the First Amendment just because it was created by the
13 State. There is no civil service --

14 JUSTICE SCALIA: What is the New Jersey Act?
15 That's a strange act. It protects State employment only
16 against First Amendment violations?

17 MR. FROST: No, it -- it mimics --

18 JUSTICE SCALIA: I can't imagine that. It
19 must -- it must have other protections for State
20 employee -- employees.

21 MR. FROST: With respect to the New Jersey
22 statute, it's just identical to a 1983 cause of action,
23 so it doesn't give you any additional rights.
24 Officer Heffernan --

25 JUSTICE SCALIA: How does it read? You have

1 to violate the Federal constitution to get relief under
2 New Jersey law?

3 MR. FROST: Do you have to?

4 JUSTICE SCALIA: Yeah. That's what 1983
5 says.

6 What is -- what does New Jersey law say?

7 MR. FROST: He proceeded in Federal court.
8 He has every right to proceed in Federal court for a
9 First Amendment violation.

10 JUSTICE SCALIA: What does the New Jersey
11 law say? You brought it up. I didn't bring it up.
12 What does it say?

13 MR. FROST: New Jersey law, the statute just
14 mimics a 1983 cause of action.

15 JUSTICE SCALIA: So it says -- it says if
16 you violate -- you can't fire a State employee in
17 violation of the Federal constitution. That's what the
18 New Jersey law says. That's a strange law.

19 JUSTICE GINSBURG: You don't have the text
20 of it, do you?

21 MR. FROST: I'm sorry.

22 JUSTICE GINSBURG: The text of the
23 New Jersey law, so we can know what we're talking about.

24 MR. FROST: Sure. I mean, this was --
25 New Jersey law can't create substantive rights. So with

1 respect to this matter, he's also not protected by civil
2 service, either.

3 JUSTICE ALITO: Well, Mr. Grabowski's brief
4 says New Jersey law provides a statutory right of action
5 for an attempt to violate an individual's civil rights.

6 Is he wrong?

7 MR. FROST: An attempt to violate?

8 JUSTICE ALITO: Yeah.

9 MR. FROST: It -- it is included in there,
10 but -- but that doesn't give you an exclusive right.
11 You can't diminish his First Amendment rights.

12 JUSTICE ALITO: No. The question is not
13 whether the New Jersey law somehow abrogates First
14 Amendment rights. The question is whether he has an
15 independent remedy under State law. That's the
16 question, I think, that's being asked.

17 MR. FROST: He could have a remedy under
18 State law. But it -- in this instance, he pursued it,
19 his First Amendment rights.

20 JUSTICE SOTOMAYOR: I'm sorry. How could
21 he? If we say there's no First Amendment right, what
22 civil right has he -- was violated if -- if what Mr.
23 Goldstein says is the --

24 MR. FROST: The civil rights --

25 JUSTICE SOTOMAYOR: -- is the state of the

1 law attempting to violate civil rights? What right, if
2 we say there isn't the First Amendment?

3 MR. FROST: The right not to associate.

4 JUSTICE SOTOMAYOR: Well, if we say it
5 doesn't exist. You lose this case.

6 MR. FROST: If what doesn't exist,
7 Justice Sotomayor?

8 JUSTICE SOTOMAYOR: Just that, the right
9 you're claiming.

10 MR. FROST: He has every right to bring this
11 claim in Federal court as --

12 JUSTICE ALITO: He may have broader
13 substantive rights under New Jersey law. I would be
14 somewhat surprised if that were not the case. The civil
15 rights to which this -- the New Jersey statute refers
16 may refer to rights under the New Jersey constitution or
17 other New Jersey laws.

18 MR. FROST: There are New Jersey laws.
19 But -- but just because -- again, it doesn't abrogate
20 your First Amendment rights. So the fact -- it
21 shouldn't matter whether or not he --

22 CHIEF JUSTICE ROBERTS: Just --

23 MR. FROST: -- engaged -- there could have
24 been a violation of any type of New Jersey statute. It
25 wasn't alleged in this case. It was never brought up by

1 Respondents in this case during -- during any of the
2 arguments in any of the briefs.

3 And -- and therefore, with respect to this
4 matter, it's our position that he has every right to
5 maintain this litigation with respect to violation of
6 his First Amendment right. And here, he is alleging
7 that he has the right not to associate. And that right
8 really stems from the fact that we have -- that this
9 Court has considered in Elrod and its progeny.

10 Furthermore, the Third Circuit makes its
11 mistake in requiring Heffernan to actually engage in
12 some type of political activity, campaigning. That's
13 not necessary, as I've indicated, with respect to Elrod
14 and the Rutan plaintiffs.

15 Additionally, the Third Circuit's decision
16 in this case is actually -- lacks common sense. I mean,
17 if you take a hypothetical with two police officers
18 going to pick up a sign, and when they go to pick up the
19 sign they're at a campaign gathering, and one police
20 officer states to his employer, yeah, I was supporting
21 Spagnola, and Mr. Heffernan would say, no, I'm -- I'm
22 not supporting it. I'm doing this to pick up a sign for
23 my mother, should make no difference.

24 The outcome is still the same in the sense
25 that they're both engaged in that activity. The only

1 difference is, is that the employer perceived
2 Mr. Heffernan as engaging in protected activity. They
3 went to stifle and squash his rights of association or
4 nonassociation. Their motive was to suppress that. And
5 clearly, that has a chilling effect on other employees.

6 I mean, it's just very clear from the
7 testimony in this case. And if you go to the Appendix,
8 page 50, what is very telling about this case is the
9 fact that when he went to pick up the sign, there was a
10 councilman there who was a chairperson of the election.
11 And he says to Heffernan, says, boy, you better be
12 careful. Maybe you should come back later while
13 we're -- because we're hanging up these signs. And that
14 clearly shows the chilling effect that it would have not
15 only in this police department or in the City of
16 Paterson, but other employees in different jurisdictions
17 and different areas would have the same issues. You
18 would have to think twice before you did something.

19 If you went to a political gathering or a
20 campaign, or you went to hear a speaker speak and you
21 picked up a pamphlet and put it on your desk, the -- if
22 your employer saw that and they didn't like that
23 candidate and they took action against you, you would
24 see that that is action based on a motive to suppress
25 one's rights.

1 JUSTICE SCALIA: All of those things would
2 be true if the mayor gave a speech saying I am going to
3 fire anybody who's not a Republican. All of those
4 things would be true. Would it chill people -- blah
5 blah blah -- would there be a cause of action? Would
6 anybody have a cause of action because of that speech?

7 MR. FROST: Because of the speech itself?

8 JUSTICE SCALIA: Yeah, just the speech. He
9 hasn't fired anybody. He's just said I am going to fire
10 anybody who's not a Republican, or anybody who's not a
11 Republican will not get promoted.

12 MR. FROST: Justice Scalia --

13 JUSTICE SCALIA: Does anybody have a cause
14 of action for that?

15 MR. FROST: There would be no claim, because
16 no action was taken. So -- so part -- you have the
17 perception that they engaged in an activity.

18 JUSTICE SCALIA: Exactly. So -- so what
19 counts is whether action was taken for a particular
20 reason, not whether you chilled -- whether you chilled
21 people, which you're arguing to us is this is
22 unconstitutional because it chills other people.
23 That -- that doesn't -- that just doesn't carry water.

24 MR. FROST: Justice Scalia, what carries
25 water is the fact that in this instance, Heffernan was

1 demoted on the employer's mistaken perception that he
2 was engaged in activity, and you don't need to engage in
3 that activity.

4 JUSTICE GINSBURG: Would you -- would you
5 say that he was demoted because he gave the appearance
6 of exercising his First Amendment rights?

7 MR. FROST: Yes. Because they perceived it
8 that he was exercising his rights, and the fact that he
9 actually was not engaged in any political activity
10 should make no difference with respect to the motivation
11 outcome of what took place with Mr. Heffernan. The
12 issue was clearly that it was ill will. It was because
13 it was against the administration, and they took that
14 action to suppress that belief, and it chills others.

15 Mr. Chief Justice, may I reserve the
16 remaining time --

17 CHIEF JUSTICE ROBERTS: You may.

18 MR. FROST: -- if there are no other
19 questions? Thank you.

20 CHIEF JUSTICE ROBERTS: Ms. Anders.

21 ORAL ARGUMENT OF GINGER D. ANDERS

22 FOR UNITED STATES, AS AMICUS CURIAE,

23 SUPPORTING THE PETITIONER

24 MS. ANDERS: Mr. Chief Justice, and may it
25 please the Court:

1 I'd like to start with Justice Kennedy's
2 question about how we define the right here.

3 We think that Petitioner has a First
4 Amendment right not to have adverse action taken against
5 him by his employer for the unconstitutional purpose of
6 suppressing disfavored political beliefs. He was
7 directly injured --

8 JUSTICE KENNEDY: And what's your best case
9 for that proposition?

10 MS. ANDERS: Well, we think that there are
11 -- there are two aspects of this -- this Court's case
12 law I think that support that, and then I'd like to get
13 back to your concern about probing of beliefs. But we
14 think that the way that the Court defined the right of
15 issue in Branti and Rutan, and again in O'Hare,
16 demonstrates that an employee doesn't have to
17 affirmatively exercise his First Amendment rights first.

18 So in those courts -- in -- in those cases
19 the court said that the plaintiff can show a
20 constitutional violation of the First Amendment simply
21 by showing that the employer acted for the
22 unconstitutional purpose of suppressing disfavored
23 political --

24 JUSTICE GINSBURG: And those cases,
25 Ms. Anders -- I missed what you said those cases were.

1 MS. ANDERS: That was Branti 445 U.S. at
2 517. Again in Rutan, and then in O'Hare, which is the
3 government contract --

4 JUSTICE SCALIA: You say in all of those
5 cases, no First Amendment right was being exercised,
6 right?

7 MS. ANDERS: No.

8 JUSTICE SCALIA: Is that your point?

9 MS. ANDERS: Well, I think actually in the
10 Rutan case there were -- there were three plaintiffs,
11 and it wasn't clear, actually, whether they had engaged
12 in any affirmative exercise of their First Amendment --

13 JUSTICE SCALIA: Was it clear that they
14 hadn't?

15 MS. ANDERS: So what the court said was that
16 they had --

17 JUSTICE SCALIA: Was it clear that they
18 hadn't?

19 MS. ANDERS: It was not clear whether they
20 had or hadn't, and the court didn't inquire into that.
21 So what had happened there was that the -- the
22 plaintiffs had been -- had adverse action taken against
23 them because they had lacked the support of the correct
24 Republican party officials. That's all the court says
25 about their allegations.

1 There are any number of reasons they could
2 have lacked that support. They could have affirmatively
3 refused, obviously, to seek the support, which would be
4 an exercise of First Amendment rights. But on the other
5 hand, they may simply have not had the time to seek the
6 right support, or they may have been ignorant of the
7 requirement in the first place. Those wouldn't have
8 involved an affirmative exercise.

9 JUSTICE SCALIA: Yeah. I thought in all of
10 these cases up to now, whenever anybody's fired,
11 demoted, or not even promoted, it hurts and -- and you
12 want to bring a lawsuit sometimes. Up to now, those
13 lawsuits would have to show I was asserting a First
14 Amendment right, and it's for that reason that I was not
15 promoted.

16 But what you're saying is, you don't have to
17 show that at all. All you have to assert is that the
18 reason I was not promoted was that the -- the employer
19 believed that I was thus and so or not thus and so. You
20 don't have to show any assertion of a First Amendment
21 right. You just show that the -- the employer liked
22 Republicans, and that's enough.

23 MS. ANDERS: Well, I think in the employment
24 context, I think there's no question that the plaintiff
25 was directly injured by the unconstitutional condition.

1 But to respond directly to your point, I think -- I
2 don't think there's a serious concern here that there
3 will be a meritless -- a flood of meritless lawsuits or
4 anything like that, and that's primarily for two
5 reasons.

6 I take your point that -- that, you know,
7 this will expand the universe of -- of litigation
8 somewhat, but we already know in the statutory context,
9 the courts have recognized suits based on a mistaken
10 perception, and -- and in that context we haven't seen
11 any flood of meritless lawsuits.

12 And with respect to Elrod claims
13 specifically, I think it's always been fairly easy for
14 plaintiffs to allege that a particular affiliation of
15 belief, I was in the Republican party --

16 CHIEF JUSTICE ROBERTS: How do you know we
17 haven't seen a flood of meritless lawsuits in that
18 context?

19 MS. ANDERS: Well, we -- we haven't in the
20 statutory context.

21 CHIEF JUSTICE ROBERTS: Yeah, the one that
22 you were just referring to.

23 MS. ANDERS: Well, we looked at this, it --
24 it doesn't come up very much. And when it does, it --
25 it looks to us that -- that courts have been able to use

1 the standard technique to --

2 CHIEF JUSTICE ROBERTS: You're looking at
3 the reported decisions rather than -- you haven't done
4 any survey to see how many complaints have been filed in
5 -- in this type of case?

6 MS. ANDERS: No. But when you looked to
7 reported decisions, what you see is that courts are able
8 to use Twombly and Iqbal and summary judgment in order
9 to get rid of claims where the allegations aren't
10 plausible or there's no evidence.

11 But I also think if the plaintiffs are going
12 to have to allege that -- that they actually held the
13 beliefs in question, this is going to raise exactly the
14 concern that Justice Kennedy mentions earlier about
15 oversight of beliefs, probing into beliefs. So this
16 will affect all Elrod cases. So anytime an Elrod case
17 is brought, the defendant will have the incentive to
18 say --

19 JUSTICE KENNEDY: So are you saying there's
20 a right to be secure from government oversight of your
21 beliefs?

22 MS. ANDERS: Well, I think the Court
23 recognized in O'Hare that that is a particular concern
24 in the affiliation context. We -- we don't want courts
25 to have to -- to examine the nature and extent of the

1 plaintiff's beliefs or associations.

2 JUSTICE SCALIA: I mean, that's a good idea,
3 maybe. And maybe -- maybe it should be in some civil
4 service act, but where do you find it in the First
5 Amendment?

6 MS. ANDERS: Well, I think the right -- the
7 right in question is the right not to be subject to a
8 test of political affiliation --

9 JUSTICE KENNEDY: Is -- is that because
10 you're concerned with a chill, or is there some other
11 right that is -- is somehow affected that's a First
12 Amendment right of the individual?

13 You turn around and you say the government
14 cannot act for an unconstitutional purpose, but we
15 usually ask how is the defendant hurt? What is his
16 right? That's still a little unclear to me.

17 MS. ANDERS: We think the defendant has
18 been hurt in the constitutional sense because the way
19 that the court has defined the right in question is the
20 right not to be subject to a test of political
21 affiliation when it's not a reasonable job requirement.

22 And I do think what the Court said in --

23 CHIEF JUSTICE ROBERTS: I think -- please.

24 MS. ANDERS: What the Court said in O'Hare,
25 essentially, was that -- not necessarily talking about a

1 separate right not to be subject to probing of beliefs,
2 but I think the Court was suggesting that we shouldn't
3 have First Amendment tests, if we can help it, that lead
4 the Court to have to probe into a plaintiff's beliefs.
5 And that is exactly what will happen.

6 CHIEF JUSTICE ROBERTS: I don't know why the
7 right isn't the right to be free from arbitrary
8 employment action based on a mistake. That's his
9 objection here. You made a mistake; you thought I was,
10 you know, being politically active. I wasn't.

11 I mean, isn't -- is there such a right under
12 New Jersey law, you can't be fired for an arbitrary
13 reason, or you can't be fired for a mistaken reason?

14 MS. ANDERS: I think with, at least with
15 respect to some job actions, there -- there would be
16 such a right under New Jersey law, and that's -- I'm not
17 sure whether it would apply here, but I think the
18 gravamen of -- of plaintiff's complaint here is not that
19 he was fired for an inaccurate reason; it's that he was
20 -- he was demoted because -- for an improper purpose,
21 the perception that he was engaging in protected First
22 Amendment activity. And --

23 JUSTICE GINSBURG: You've brought up in your
24 brief, I think, that -- that the employer might have had
25 a contract-type policy. I think you said we should

1 remand to determine whether this employer said nobody
2 engages in political activity.

3 MS. ANDERS: Well, I think -- I think if you
4 rule for the Petitioner here, there would be a remand
5 anyway because the Court hasn't --

6 JUSTICE GINSBURG: Is it based on the facts
7 up till now to think that there was such a policy?

8 MS. ANDERS: Well, so there -- there is, I
9 think, a factual dispute about this. So if you look at
10 the -- the summary judgment filings, this is document
11 No. 189 on Pacer, there -- there are, in -- in the
12 Respondents' statement of undisputed facts, some
13 assertions that this was in fact a neutrality policy.

14 Now you definitely have a dispute about that
15 coming back from the other side. Petitioner says that
16 nobody knew about that policy. So we think that is one
17 thing that potentially the lower courts would have to
18 look at, decide whether it was preserved and -- and
19 resolve the dispute in that sense.

20 But I do want to get back to another concern
21 that I think Respondents' position raises. You know, we
22 do think that -- that Petitioner has his own First
23 Amendment right here. That was violated.

24 We do think that when an employer acts
25 against an employee based on a mistaken perception of

1 his beliefs, that creates exactly the same chilling
2 effect with which the Elrod cases are concerned.

3 So the other employees will know that the
4 employer expects political orthodoxy and will be chilled
5 in their -- in their own association as a result.

6 I think there's another concern here that
7 deepens the chilling effect, and that is that the logic
8 of Respondents' position applies not only in cases of
9 honest mistake, it also applies in cases in which the
10 employer acts to exploit a loophole, essentially.

11 You can imagine a situation in which the
12 employer knows that some people have engaged in
13 political affiliation. The employer wants to send a
14 message, and it does that by acting against the employee
15 it thinks didn't actually engage in that association.
16 And so I think that is one of the dangers of
17 Respondents' rule here, that it will create a loophole.

18 And so what we are saying, essentially, is
19 that it's just a narrow corollary to the Elrod right
20 that the Court has already recognized. When the
21 employer acts with the exact same intent that -- that is
22 already impermissible under Elrod, and it injures the
23 employee in his employment as a result, then the
24 employer should be equally liable. It shouldn't get a
25 free pass simply because it -- it's ill-motivated and

1 wrong.

2 If there are no further questions.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Goldstein.

5 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

6 ON BEHALF OF THE RESPONDENTS

7 MR. GOLDSTEIN: Mr. Chief Justice, and may
8 it please the Court:

9 The doctrinal fight in the briefing is over
10 whether the plaintiff in a case like this has to assert
11 a constitutional right. And I think the questions so
12 far have indicated an understanding that the plaintiff
13 would have to. And the real question, then, is, is
14 there actually a constitutional right here, one that we
15 might define in other terms, including the one that
16 Justice Kennedy identified as the right not to have your
17 political views inquired in.

18 And this is actually discussed in the
19 Court's opinion in O'Hare in describing Elrod and
20 Branti. And so I want to start there because we have to
21 recognize that this right has never been recognized in
22 any other political association case whatsoever. And
23 there's no logical reason why it would occur
24 specifically in the public employment context, which is
25 an unconstitutional --

1 JUSTICE GINSBURG: Can you explain,
2 Mr. Goldstein, what sense it would make to say there are
3 two people, the example Mr. Frost gave. One of them is
4 a big supporter of Spagnola, and he gets demoted. And
5 the other is politically neutral, and he gets demoted
6 because the employer thinks he's the supporter of the
7 rival mayoral candidate.

8 What -- how could you make sense to a person
9 of ordinary reason that one of them, the one who was in
10 fact engaging in political activity, can't be demoted
11 but the other one, who just was innocent, didn't do
12 anything?

13 MR. GOLDSTEIN: I'm sorry.

14 I have to focus on, really, the precise
15 wording of your hypothetical, but I think you may
16 actually have something slightly different in mind,
17 because you identify this, the second employee, one who
18 is politically neutral. And the Court has said, in
19 cases like Elrod and Branti, that the decision to remain
20 neutral -- that is, I see this candidate, I see that
21 candidate. I'm going to just not choose between them,
22 because I -- you know, for any individual reason, that
23 that's protected. That's a political choice. And in
24 your precise hypothetical, both of those employees would
25 have a claim.

1 This case is different, and critically
2 different. The other side has quite consciously,
3 throughout the case, made only two arguments. The first
4 is that he was a supporter of Spagnola. And he's given
5 up on that.

6 And the second is that he had no association
7 whatsoever. He didn't have any more association than I
8 did. He was politically oblivious.

9 And so, Justice Ginsburg, if you were to ask
10 me that question, which is what difference -- what --
11 what sense does it make? The sense that it makes is one
12 is exercising a constitutional right, and one doesn't --

13 JUSTICE KAGAN: So just to make sure I
14 understand what you're saying, suppose there's somebody
15 who comes into office, and it's a Democrat. And he says
16 I want as many Democrats as possible in my office, no
17 matter what jobs they're doing.

18 Now, what you're saying is he can't demote
19 or fire Republicans. He can't remove, demote, or fire
20 people who have other political views, neither Democrat
21 or Republican. But what he can do is he can get rid of
22 anybody who is just politically apathetic.

23 Is that your view?

24 MR. GOLDSTEIN: If that was actually the
25 policy, then technically, the answer to your question is

1 yes under the First Amendment. And I'd like to explain
2 why. I know it sounds anomalous.

3 The reason is that those people -- there is
4 nothing in the First Amendment that says that the
5 government can't encourage people to be politically
6 active. And that is entirely the point of Elrod and
7 Branti.

8 JUSTICE KENNEDY: So you -- you encourage
9 the person to be politically active and then fire him or
10 her because they're politically active the wrong way?

11 (Laughter.)

12 MR. GOLDSTEIN: No, sir.

13 JUSTICE KENNEDY: Suppose the employee says,
14 you know, I don't like the evening news. I -- I -- I
15 like fiction. I -- I don't -- I don't know if I'm
16 Republican or Democrat. I don't care.

17 MR. GOLDSTEIN: Right.

18 JUSTICE KENNEDY: He -- he -- he cannot be
19 fired? What is his right?

20 MR. GOLDSTEIN: My point, Justice Kennedy,
21 is that he may have a State law right; he does have a
22 collective bargaining agreement right, but he doesn't
23 have a First Amendment right, because he's not engaging
24 in First Amendment-protected activity.

25 I do --

1 JUSTICE KAGAN: See, I --

2 JUSTICE KENNEDY: The -- the government has
3 -- excuse me.

4 MR. GOLDSTEIN: Sorry.

5 JUSTICE KENNEDY: The -- the -- the
6 government has a right to compel him to declare one way
7 or the other?

8 MR. GOLDSTEIN: No -- Justice Kennedy, and
9 that -- that brings us back to your question. And that
10 is does he have a right not to have an inquiry into his
11 political views. And that is, of course, not a right
12 that's been recognized in any other political
13 association context.

14 When the Court discussed it in O'Hare, it
15 did it in a very specific and really important way, and
16 that is it looked at cases like Elrod and Branti, which
17 are general policies. And what the Court has said
18 there, is that when it's a sweeping policy, it's not
19 necessary into -- to inquire into individual political
20 beliefs.

21 And what those cases ought to be understood
22 as is applications of First Amendment overbreadth
23 doctrine.

24 It is commonplace in First Amendment law
25 that if you have a general rule, and the general rule

1 will be unconstitutional as applied to some people, and
2 the other people involved weren't asserting First
3 Amendment rights, the policy can be facially
4 unconstitutional, and we don't inquire into the
5 individual standing of the plaintiff.

6 And that's what happens in Elrod and Branti.
7 It's not necessary to inquire into the -- each
8 individual employee. It is an entirely different --

9 JUSTICE KAGAN: See, I had always thought
10 that the -- the idea behind those cases is a different
11 one. That the idea has to do with why the government
12 acted. And once we say that the government acted for an
13 impermissible purpose, which is to -- let's say in my
14 hypothetical, get as many Democrats as possible into the
15 government, once we say that's an impermissible purpose,
16 it matters not at all whether the person is a
17 Republican, an -- an independent, or somebody who has
18 never thought about politics in his life, because the
19 government is acting in a way that's wrongful,
20 irrespective of that.

21 MR. GOLDSTEIN: And we just disagree. It's
22 called an individual right, not a government wrong. The
23 individual has to be engaging in -- whether it's
24 expression or association, I actually thinks it's not
25 contested, Justice Kagan, any more on the free speech

1 side, that with cases like Waters, an employee cannot
2 bring a First Amendment free speech claim that says, you
3 know, I didn't actually engage in speech, but my
4 employer thought I did. There is no First Amendment
5 right not to have this individual inquiry.

6 And Justice Kennedy, remember that our
7 position, in particular --

8 JUSTICE KAGAN: So does that mean that the
9 government can compel speech of a person if the person
10 really just doesn't care one way or the other?

11 MR. GOLDSTEIN: No. It's a very important
12 distinction. So let me give a hypothetical that ought
13 to be hard for us, and that is Heffernan is asked by the
14 chief of police, you know, do you support the mayor.
15 He's completely agnostic, and he refuses to support the
16 mayor, and he's transferred.

17 The decision not to support or to be
18 subjected to your hypothetical is a political choice.

19 This case was framed by the plaintiff in a
20 very specific way on purpose, and that is he disclaimed
21 any such influence, any such pressure, any such choice
22 that he was having to make.

23 Now, the important piece about -- on this
24 question of inquiry is that our position only applies to
25 a party that doesn't claim anything other than being

1 politically apathetic. So Justice Kennedy, there is no
2 inquiry.

3 Justice Kagan is quite right that if you
4 have somebody who is an Independent or a Democrat or
5 Republican, the First Amendment doesn't care. But if
6 the plaintiff is going to pursue a claim that says I'm
7 not engaged in association or speech, there is nothing
8 to inquire into --

9 JUSTICE GINSBURG: Mr. Goldstein, let's take
10 a Title VII case, and the employer fires a woman because
11 he thinks she's pregnant. She brings a sex
12 discrimination case and alleges, well, I wasn't
13 pregnant. I just was gaining weight.

14 So she has no sex discrimination claim,
15 then, because he she wasn't pregnant?

16 MR. GOLDSTEIN: Justice Ginsburg, the courts
17 are divided. The position of the EEOC is that she would
18 have a claim. I just think it's a good point for us
19 that Congress can write laws that recognize such,
20 regarded as claims.

21 JUSTICE SCALIA: Those -- those statutes
22 focus on the employer. The employer cannot discriminate
23 on the basis --

24 MR. GOLDSTEIN: Right.

25 JUSTICE SCALIA: -- of sex.

1 MR. GOLDSTEIN: Right.

2 JUSTICE SCALIA: And that employer was doing
3 that.

4 The First Amendment does not focus on the
5 government; it focuses on the citizen. The citizen has
6 a right to free speech and free association.

7 MR. GOLDSTEIN: So --

8 JUSTICE SCALIA: That's the difference
9 between the two cases.

10 MR. GOLDSTEIN: Well, it will not surprise
11 you that I agree, Justice Scalia.

12 The -- Justice Kagan, if -- if we could just
13 take this outside the public employment context. And
14 the reason I want to do that is that we ought to be able
15 to agree that the First Amendment rights aren't
16 greater association of rights there. The Court has
17 pointed out that there is a greater Federalism interest
18 in managing the public employment workforce, and also
19 that this is an unconstitutional conditions case.

20 But just imagine the following simple -- you
21 know, hypotheticals that relate just to this case.

22 Imagine that the chief of police, with the same
23 motivation, went up to Heffernan as he went to pick up
24 the sign, grabbed the sign, and tore it up. Or imagine
25 that Heffernan was trying -- was stopped from entering a

1 parade in favor of Spagnola, but what he was actually
2 trying to do was just cross the street. Or he went to
3 the building where it is that Spagnola had the -- his
4 headquarters, and the chief of police stopped him from
5 going in, but he was actually going to his lawyer's
6 office.

7 Those are all the exact same motivation.
8 And there -- I don't think there's any way the Court
9 would recognize such a claim.

10 It's a very sympathetic claim. Okay? I get
11 the fact that we are very concerned that public
12 employees not be transferred or demoted, but we have
13 other laws and other regimes that are -- that fill that
14 gap.

15 CHIEF JUSTICE ROBERTS: What is -- what is
16 the other law here? What -- what relief does he have?

17 MR. GOLDSTEIN: He has two forms of relief.

18 The first is the collective bargaining
19 agreement. I will tell you that it is not in the
20 record, but it is judicially noticeable. It is a public
21 document. It's available on the government Web sites of
22 the State of New Jersey, and it is exactly what you
23 would expect. In fact, it's a little bit broader. It
24 says that if you are -- you have an employment action
25 that is inequitable, it is -- you -- it is grievable.

1 The second thing is the attempt provision,
2 which was discussed, and Justice Alito is right, that
3 there are broader civil rights under New Jersey law.

4 And this just makes sense. The Court, in
5 cases --

6 CHIEF JUSTICE ROBERTS: Well, do -- do you
7 agree that the Petitioner is entitled to relief under
8 that provision of the collective bargaining agreement?

9 MR. GOLDSTEIN: If -- if he -- his
10 allegations of the facts are correct, yes.

11 JUSTICE KENNEDY: In your hypothetical about
12 stopping the person from crossing the street, or, they
13 think, entering the parade, the individual is -- has no
14 right to insist that the government doesn't make a First
15 Amendment judgment about his activities?

16 MR. GOLDSTEIN: That's correct.

17 Justice Kennedy --

18 JUSTICE KENNEDY: In -- in other words,
19 the -- the -- the individual in the -- in -- in -- in --
20 the citizen of the United States, have no right, have --
21 have -- have no -- have no injury, have no interest in
22 making sure the government doesn't evaluate everything
23 they do from a political standpoint?

24 MR. GOLDSTEIN: I think they have an
25 interest, Justice Kennedy. I'm not saying that. We are

1 concerned that people be able to have conscience, that
2 they be able to make their own personal, private
3 judgments. But what we're talking about here in the
4 context in which there is a real concern that I would
5 like to talk about, about whether it will interfere with
6 the management of local government, that it's an
7 affirmative constitutional right, it's a violation of
8 the First Amendment.

9 Now the reason you ought to be concerned,
10 Justice Kennedy, is there is another side of the coin.
11 Take it from the perspective of the supervisor. If this
12 right is recognized, which is to say the plaintiff need
13 not have engaged in any association, then the
14 supervisor's expression of political views may well be
15 chilled because he has to worry that any employee can
16 say, look, I was regarded as politically active.

17 If I could just give you this case again,
18 and that is, take the sign out of it.

19 The plaintiff says he was well known as a
20 Spagnola friend and supporter. Okay? Imagine that
21 that's discussed in the chief of police's office, but
22 the chief of police thinks that -- that Heffernan really
23 should be transferred. Okay? The chief -- if the
24 Petitioner is right, you really have to worry because if
25 it's discussed, then there's every reason that Heffernan

1 can just bring a lawsuit saying, look, I wasn't actually
2 involved in the campaign, but you did because he was my
3 friend. And that is a very significant consequence for
4 the individual rights.

5 Now, if we didn't have other protections
6 that get to the concern about conscience, I could see
7 the case being even stronger.

8 JUSTICE KENNEDY: We know that you can't --
9 let's assume in this particular position you can't be
10 fired because you're a Republican or a Democrat and
11 that's what they -- that's what -- what they do. But
12 that -- the person did not engage in that activity.
13 He's still -- he still is in the position of the
14 government ascribing to him a political belief that he
15 does not have.

16 MR. GOLDSTEIN: Justice Kennedy, that's
17 right. The government thinks a lot of things about me,
18 okay? Some of them are not very nice, I imagine, but --
19 and some are about my politics and that sort of thing.
20 But there is not a constitutional right to have the
21 government not think something about you. Just remember
22 as well --

23 JUSTICE KENNEDY: Here, they thought and
24 they acted.

25 MR. GOLDSTEIN: Okay. Or to act,

1 Justice Kennedy.

2 JUSTICE GINSBURG: It's not just something.

3 MR. GOLDSTEIN: Oh.

4 JUSTICE GINSBURG: It's -- the government is
5 taking action against a person because the government
6 thinks that that person is exercising First Amendment
7 rights.

8 MR. GOLDSTEIN: Just --

9 JUSTICE GINSBURG: And I thought -- and
10 unlike Justice Scalia -- that the thrust of the First
11 Amendment is operating on government. It says
12 government, thou shalt not -- thou shalt not act on the
13 basis of someone's expression, speech or belief.

14 MR. GOLDSTEIN: Well, essentially all of the
15 rights, individual rights in the Constitution, other
16 than the antislavery provision, requires State action.
17 They all talk about what the government can't do. But
18 the government --

19 JUSTICE GINSBURG: Yes, so here, the
20 government acted. No question they demoted the person.
21 This was a detective, and they put him back on the beat.
22 So the government acted. Why did they act? Because
23 they thought that this person was engaging in political
24 activity.

25 MR. GOLDSTEIN: Well, Justice Ginsburg, let

1 me just say that I don't think it's -- it's contested
2 after the Petitioner's reply brief. You described this
3 in First Amendment terms, that if this was a speech
4 case, which it used to be, rather than an association
5 case, he would lose. It is well settled in this Court's
6 precedents that the threshold inquiry under Pickering is
7 did the individual engage in the constitutionally
8 protected activity?

9 This actually is at issue, I should say, in
10 the Court's other associational case, public employment
11 association case, this sitting, where there is a
12 significant issue of is there a different rule that
13 applies -- when we're talking about a policy, Justice
14 Kennedy -- that applies broadly to a lot of employees
15 versus an individual, one-off employment action which is
16 what is at issue here?

17 We think that's a critically important
18 distinction, whether you look at this as kind of a
19 Pickering standard case, where the first thing that has
20 to happen is that the individual has to assert at least
21 that they engaged in the constitutionally protected
22 activity. If you have an Elrod and Branti-type case,
23 which is what's discussed in that part of O'Hare, it's
24 an entirely different kettle of fish because there, you
25 do have a general policy. You could see people being

1 chilled. You could see the government taking a broad
2 view of its employees.

3 JUSTICE KAGAN: I guess I'm not sure how
4 that works. It just seems to break down very easily, if
5 you can't have a broad rule that says that you can fire
6 everybody but Democrats. But you're saying that you are
7 going to allow somebody to come in and fire people one
8 at a time.

9 MR. GOLDSTEIN: Justice Kagan, that's, of
10 course, not what I'm saying. What I'm saying is that
11 under First Amendment Overbreadth Doctrine, when you
12 have a general policy -- and this is what we think
13 happened in Elrod and Branti -- the fact that you
14 don't -- you do not inquire into the individual person's
15 political views because the policy is facially
16 unconstitutional. But it has never been the case in any
17 context.

18 And the other side has had every opportunity
19 in the world. We cannot find any First Amendment case
20 that says, you know what? You don't have to engage in
21 constitutionally protected activity so long as the
22 government thinks you did. And it's really a problem if
23 that's the rule because it is the threshold thing that
24 stops plaintiffs with meritless cases from getting out
25 of the box. In all of these cases, if the plaintiff no

1 longer has to say, I engaged in --

2 JUSTICE KAGAN: But you're saying -- and --
3 and I think you said this straight out -- you're saying
4 I can come into an office -- I'm a Democrat. I can -- I
5 can identify every person without a well-known political
6 view, every couch potato out there, just fire one after
7 another, after another, after another. Replace them all
8 with Democrats, change the entire character of the
9 office, do it for a reason that I prefer one political
10 view to any other, and that that will not be a violation
11 of the First Amendment.

12 MR. GOLDSTEIN: That will -- two things.
13 First, I think it is practically impossible because you
14 would have to somehow magically pluck out the people who
15 are politically apathetic from those that are
16 politically neutral. I don't think you can do it.

17 But the second is that's right. The
18 Constitution doesn't fix everything.

19 JUSTICE KENNEDY: You want this Court to
20 hold that the government of the United States has a
21 right to ascribe to a citizen views that he or she does
22 not hold.

23 MR. GOLDSTEIN: Justice Kennedy, I think
24 that that is not a First Amendment violation. I don't
25 think the other side thinks it's a First Amendment

1 violation. Remember that there's the materiality
2 requirement.

3 JUSTICE KAGAN: See, I had always thought
4 that the First Amendment running through all our cases
5 is an extremely strong strand. That part of the reason
6 we have these protections is because we worry the
7 government is doing things for impermissible reasons.
8 That the government wants to create a world of speech in
9 which everybody agrees with it and nobody opposes it.

10 And that's a fundamental tenet of what the
11 First Amendment and all our cases are about. And you're
12 saying, oh, no. The government's motive doesn't really
13 matter as long as you can't point to somebody who is
14 holding up a sign.

15 MR. GOLDSTEIN: Justice Kagan, I think you
16 are right. It is an important thread of this Court's
17 decisions. And the Court has said that it is a
18 necessary but not sufficient condition. Waters makes
19 very clear, which is a First Amendment public employee
20 case, that the individual has to have engaged in the
21 constitutionally protected activity. Every one of --
22 Garcetti says the same thing. You have to have an
23 individual --

24 JUSTICE BREYER: Can I just approach the
25 same thing from a different perspective? Suppose can

1 Congress pass a law or a legislature pass a law that
2 attempts to abridge the freedom of speech. Is that a
3 violation of the First Amendment? It's an attempt.

4 MR. GOLDSTEIN: What would the attempt --

5 JUSTICE BREYER: Well, let's say there
6 doesn't have to be a thousand examples.

7 MR. GOLDSTEIN: The Court --

8 JUSTICE BREYER: You say that's the law. No
9 one can espouse in a public place the political
10 philosophy of Ruritanianism, okay?

11 MR. GOLDSTEIN: No.

12 JUSTICE BREYER: Okay. I mean, I doubt that
13 they'll pass such a law --

14 (Laughter.)

15 JUSTICE BREYER: -- but I just -- substitute
16 any one that you want for that. They pass it. And by
17 the way, the six people who hold that philosophy all
18 leave on a boat before the effective date, but -- or
19 what's more likely, they bring a declaratory judgment
20 action, and the law never takes effect.

21 MR. GOLDSTEIN: Right.

22 JUSTICE BREYER: And therefore, it had no
23 impact. And that happens every day of the week. I'm
24 just wondering if such a law, which is an attempt --
25 it's right on the books as blatant as you want --

1 whether that violates the First Amendment. That's a
2 serious question. I'm not taking a point of view. I
3 want to know what you think.

4 MR. GOLDSTEIN: Justice Breyer, the reason
5 that we allow --

6 JUSTICE BREYER: Well, I just want to know,
7 is it yes or no? Does it -- in your opinion, does it
8 attempt to -- a clear attempt to violate the First
9 Amendment in a statute? It has general application.
10 Does it violate the First Amendment? Does it abridge
11 the freedom of speech?

12 MR. GOLDSTEIN: If it's only going to be an
13 attempt and it's not going to succeed, no. The statute
14 you describe is unconstitutional.

15 JUSTICE BREYER: It is unconstitutional.

16 MR. GOLDSTEIN: That's right. There are all
17 kinds of times --

18 JUSTICE BREYER: It will have a lot of bad
19 effects. It will have all kinds of chilling effects all
20 over the place.

21 MR. GOLDSTEIN: If it's defined, Justice
22 Breyer, as not going to succeed, if the statute doesn't
23 say --

24 JUSTICE BREYER: No, no, by chance it
25 happens not to succeed.

1 MR. GOLDSTEIN: Oh, no, Justice Breyer. If
2 the person --

3 JUSTICE BREYER: It's my hypothetical.

4 (Laughter.)

5 MR. GOLDSTEIN: I know. I'm just -- I'm
6 just trying to keep up with it. The -- in -- in the one
7 that you just described, Justice Breyer, if it is the
8 case that the law is going to go into effect, we do
9 allow, including under First Amendment overbreadth
10 grounds, an effort to bring a declaratory judgment
11 action.

12 JUSTICE BREYER: Of course. And I'm just
13 asking you if, in fact, they think it will succeed, they
14 want it to succeed, that's why they passed it, and
15 through a fluke it fails, does the fact that it fails
16 mean that it doesn't violate, it doesn't -- does it not
17 -- does it or does it not violate the First Amendment?

18 MR. GOLDSTEIN: It doesn't.

19 JUSTICE BREYER: It does not.

20 MR. GOLDSTEIN: And here would be an
21 example.

22 JUSTICE BREYER: And he fails -- if it fails
23 --

24 MR. GOLDSTEIN: If I could just finish,
25 Justice Breyer, just so -- I really do want to help. If

1 Congress at the same time passed a law that said no
2 Federal funds shall be used to implement the ban on
3 talking about the political views of Ruritania, that is
4 to say the law won't go into effect -- we tried, but the
5 money was taken away from us -- it's not
6 unconstitutional.

7 JUSTICE SCALIA: Or -- or you could say that
8 the law is passed by Congress but vetoed by the
9 President, is there a violation of the Constitution?

10 MR. GOLDSTEIN: There would not be. But in
11 my hypothetical vote in which -- or Justice Breyer's
12 where it actually goes into effect --

13 JUSTICE SOTOMAYOR: We're off on a tangent
14 because there's no injury in this situation when a law
15 doesn't go into effect. But coming back to what
16 Justice Breyer, I believe, is attempting to say --

17 (Laughter.)

18 JUSTICE SOTOMAYOR: I don't know,
19 Mr. Goldstein, that I understand either. And I think
20 Justice Kagan asked you this. Why does it matter -- and
21 we don't care whether someone is a Republican or not in
22 Elrod and Branti and those cases -- and you say it's
23 only because it's a policy. The intent of the
24 government is to say I'm not going to promote anybody
25 who is not a Democrat or not a Republican.

1 MR. GOLDSTEIN: More than a policy, it will
2 actually have adverse consequences for someone trying to
3 exercise their constitutional rights.

4 JUSTICE SOTOMAYOR: Well, someone, they have
5 come along and not promoted people.

6 MR. GOLDSTEIN: Yeah.

7 JUSTICE SOTOMAYOR: All right? So you have
8 to have someone come in and say I'm not a Democrat?

9 MR. GOLDSTEIN: Justice --

10 JUSTICE SOTOMAYOR: I'm not a --

11 MR. GOLDSTEIN: Sorry.

12 JUSTICE SOTOMAYOR: -- Republican? Or you
13 need someone to tell you what they are?

14 MR. GOLDSTEIN: No. No. Common sense does
15 not leave the courthouse, and that is if I have a policy
16 that says, I will not hire Democrats, I think a court
17 would understand that there are going to be Democrats
18 who would apply for jobs. And there doesn't need to be
19 an inquiry. But the --

20 JUSTICE SOTOMAYOR: So why isn't it simple
21 to say, I'm not hiring you, or, I'm demoting you because
22 you politically associated? And doesn't that chill the
23 person from even walking by a campaign? Doesn't it
24 chill others who do want to associate marginally?

25 MR. GOLDSTEIN: No. It's a real --

1 JUSTICE SOTOMAYOR: I'm assuming there's no
2 policy in place, that there's not --

3 MR. GOLDSTEIN: Justice --

4 JUSTICE SOTOMAYOR: There's nothing to
5 prevent this otherwise, like the Hatch Act.

6 MR. GOLDSTEIN: I think it's a really
7 important point on the question of chilling because
8 Elrod and Branti and the rules that also -- and O'Hare,
9 which is a one-off case, do say that you can't do this
10 for political purposes if the person is actually
11 exercising a constitutional right.

12 So that we all agree that if the plaintiff
13 here was a supporter of Spagnola, or even of the mayor,
14 or had decided to remain politically neutral, this is a
15 bizarre case that comes to you on the assumption that he
16 is completely politically apathetic.

17 JUSTICE SCALIA: It -- it is bizarre. And
18 do -- do you really believe, Mr. Goldstein, that the
19 Constitution does not solve all problems? You -- you --

20 (Laughter.)

21 JUSTICE SCALIA: -- made a statement to that
22 effect. You really believe that?

23 MR. GOLDSTEIN: No, but I -- I --

24 JUSTICE SCALIA: It doesn't solve every
25 problem.

1 MR. GOLDSTEIN: No. But I do think that
2 there is a concern that comes into play. And so I do
3 not mean to demean the concern about the government
4 having a sense of what individuals' political views are.

5 But I'm saying that that happens, Your
6 Honors, in all kinds of cases, whether it's
7 redistricting, whether it's campaign finance. There's
8 lots that we do to ascribe political views to people in
9 this country. And adopting that doctrine is going to
10 have pretty widespread consequences when it's not
11 necessary.

12 I do think that it should be common ground
13 that there are multiple layers of protections for these
14 employees. The basic rule -- and Justice Kennedy,
15 remember, under the basic rule, the plaintiff has always
16 come in and said, I'm a Democrat, right? The Elrod
17 Branti rule when it's involved, one-off cases. The
18 opinion in O'Hare describes the political views of the
19 tow truck company there. And it has never been regarded
20 as a First Amendment problem when you don't actually
21 exercise any First Amendment rights.

22 JUSTICE BREYER: But that is a First
23 Amendment problem for the reason that lots of other
24 people will have their speech chilled. And normally in
25 the law there is a doctrine where the person who does

1 the bad thing makes a mistake, he's held anyway. That's
2 true of transferred intent. You shoot A, but you meant
3 to shoot B. It's true of -- of attempts generally.

4 MR. GOLDSTEIN: It's not true of the
5 Constitution.

6 JUSTICE BREYER: Why not?

7 MR. GOLDSTEIN: Well --

8 JUSTICE BREYER: That is to say I would
9 think that a statute that has a chilling effect on the
10 speech of millions of people but is directly aimed at A,
11 B, and C, if because of some fluke A, B, and C are not
12 themselves injured, nonetheless everybody else is, and
13 it would violate the First Amendment.

14 MR. GOLDSTEIN: Under --

15 JUSTICE BREYER: That, I think, is what you
16 have here, which is why I raised my point.

17 MR. GOLDSTEIN: Great. Justice Breyer --
18 and if you would just contrast in your own mind the
19 statute that affects millions of people versus the beat
20 cop who talks to one person in terms of its chilling
21 effect, because First Amendment overbreadth doctrine was
22 born because of our hypothetical.

23 The concern that a broad policy or statute
24 will have widespread effects. That is not anything like
25 this. We have a guide --

1 JUSTICE SCALIA: Do you know of any case in
2 which we have relied on chilling effects where what was
3 at issue was a one-off like this one as opposed to a --
4 a general policy which had a chilling effect? I don't
5 know of any case.

6 MR. GOLDSTEIN: To the contrary, I can tell
7 you that in -- in both Waters and Garcetti v. Ceballos,
8 the Court said, look, we recognize the rule that's being
9 proposed to us. So in Waters it was the idea that the
10 public -- the employer's views wouldn't matter; it would
11 just be whether the speech was protected.

12 In Garcetti it was the question of whether
13 it was the public employer's speech. And the public
14 employee's argument in both those cases is that, look,
15 these rules are going to chill speech because they are
16 of uncertain boundaries. We need to have wide-ranging
17 expression. If I have to bring my case, there will be
18 inquiries into my speech views or whatever, and the
19 Court said we just have to balance things here.

20 There is a real concern that is rooted in a
21 history of the United States involving political
22 patronage. We have -- the Court has never tried to
23 extinguish politics from local government. And if you
24 try to do that in New Jersey, we are going to be here a
25 lot.

1 JUSTICE KAGAN: And the --

2 (Laughter.)

3 JUSTICE ALITO: And the question in this
4 case seems to me to be highly artificial. It's sort of
5 -- it's like a law school hypothetical.

6 MR. GOLDSTEIN: I agree.

7 JUSTICE ALITO: How often will it be the
8 case that an employee will be unable to allege any
9 expression or any association that is protected by
10 the -- the First Amendment? It seems to me quite rare.

11 And it may be that this case comes to us the
12 way it does because the plaintiff was dealing with two
13 things, one was the First Amendment, and the other -- I
14 mean one was the issue that's -- the question of his
15 motivation, and the other was this alleged policy
16 prohibiting any kind of political activity.

17 Even in the -- the person who is just
18 apathetic, is there not a -- a First Amendment right to
19 be -- say, I don't -- I don't like politics, I don't
20 want anything to do with politics, I'm not going to
21 register, I'm not going to vote?

22 MR. GOLDSTEIN: All right. So Justice
23 Alito, the Third Circuit has a rule discussed in the
24 brief -- brief in opposition adopted in a case called
25 Ghaly that says you do have the right to be politically

1 apathetic. The reason the case is so bizarre is that
2 the other side, for its own reasons, decided not to
3 assert that right.

4 Now, I will say that it does nonetheless
5 matter because there are going to be other kinds of
6 cases where you have a public employee that just is not
7 asserting any rights at all, and is not involved, say,
8 in environmentalism or gun rights or whatever. And the
9 public employer, if it's thought just to have perceived
10 the employee as having been involved in some
11 association, then is subject to a claim.

12 And our real --

13 JUSTICE SOTOMAYOR: I'm sorry. You have
14 to -- you have to show some facts to draw that
15 inference.

16 MR. GOLDSTEIN: Well --

17 JUSTICE SOTOMAYOR: I mean, you just can't
18 say, I'm involved in this and the employer fired me
19 because of that.

20 MR. GOLDSTEIN: Well, Justice Sotomayor --

21 JUSTICE SOTOMAYOR: To show some connection
22 between the firing and --

23 MR. GOLDSTEIN: Right.

24 JUSTICE SOTOMAYOR: -- the political belief.

25 MR. GOLDSTEIN: I would just take you back

1 to my hypothetical of getting rid of the sign. And his
2 political view -- his support of Spagnola is discussed
3 in -- in the chief's office, right? And then he has to
4 be reassigned. And the chief has to really worry that
5 he's going to be sued.

6 The -- my point is this: The set of cases
7 that you have to be concerned with, there have been no
8 other cases we've been able to identify like this one.
9 It's very small.

10 JUSTICE KAGAN: Well --

11 MR. GOLDSTEIN: But the downside risk is
12 significant.

13 JUSTICE KAGAN: Mr. Goldstein, I mean, if
14 somebody had come in to me before today's argument and
15 just said, does the First Amendment prevent the
16 government from punishing a person because that person
17 does not share the government's views, I would have
18 said, why, yes, of course the First Amendment protects
19 that. That's the whole point of the First Amendment.

20 And now you're telling me, no, the First
21 Amendment does not prevent the government from punishing
22 a person because that person doesn't share the
23 government's views, unless that person is actively
24 opposed to the government's views.

25 But if that person just really could not

1 care less, which a lot of people in this country could
2 not care less; they don't vote, they don't pay
3 attention, they wouldn't know who was running. But the
4 government can punish that person because that person
5 doesn't share the government's views. And I would have
6 said, that is one strange doctrine.

7 MR. GOLDSTEIN: It -- it may be that I have
8 not persuaded you in this case.

9 (Laughter.)

10 MR. GOLDSTEIN: The -- the -- I will say,
11 Justice Kagan, what you ask is, can the government do
12 it? The government cannot because there are lots of
13 other protections. And remember, if the person is
14 politically neutral, it is the case that -- the right of
15 political association is the right of political
16 association. If you aren't engaging it, you aren't
17 actively pursuing the right in any way, or even if you
18 aren't active about it.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Mr. Frost, you have a minute left.

21 REBUTTAL ARGUMENT OF MARK FROST

22 ON BEHALF OF THE PETITIONER

23 MR. FROST: Thank you, Mr. Chief Justice.

24 A couple points that I want to make with
25 respect to declaring one as a neutral.

1 If Heffernan was engaged in political
2 activity and said, I'm supporting Spagnola, of course he
3 would be protected by the First Amendment. What I'm
4 hearing is that if he said, I'm neutral, he would be
5 covered; he would be protected. I see little difference
6 between being a neutral and being agnostic in the sense
7 that I'm not taking a position.

8 So -- so --

9 JUSTICE SOTOMAYOR: I'm -- I'm so totally
10 confused. I know it's the way it was presented to us,
11 but I thought he testified that he had made a choice not
12 to get involved in the campaign but that Spagnola was
13 his friend and he supported him. So he wasn't neutral;
14 he just wasn't engaging in associational conduct by
15 choice. That's what I thought.

16 MR. FROST: That's correct, Justice
17 Sotomayor. And the point that I was trying to make was
18 the fact that in this case he was not going to be
19 exercising his right to vote or campaign for him, but --
20 but clearly he engaged in what we would consider core
21 First Amendment activity by picking up that sign.

22 The mistake that the employer made was
23 actually one that they perceived him as actually
24 campaigning on behalf of Spagnola. And that should make
25 no difference for the simple reason that with respect to

1 that activity, it's because the Court sees that the
2 government is acting for an impermissible purpose, and
3 that was the press --

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Thank you, counsel.

6 The case is submitted.

7 (Whereupon, at 11:02 a.m., the case in the
8 above-entitled matter was submitted.)

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| A | | | | |
|--|--|--|--|---|
| a.m 1:14 3:2 61:7 | 19:2,3,9 26:22 27:2 30:10 32:24 41:12 42:24 43:8,22 44:21 46:21 56:16 60:2,21 61:1 | 14:12 15:12 39:2 56:3,7,23 | 19:22 analysis 5:15 8:6 | argument 1:13 2:2,5,9,12 3:3 3:7 4:12 19:21 29:5 55:14 58:14 59:21 |
| able 6:25 23:25 24:7 37:14 40:1,2 58:8 | acts 3:25 7:18 10:2 27:24 28:10,21 | allegation 10:12 allegations 21:25 24:9 39:10 | Anders 1:18 2:6 19:20,21,24 20:10,25 21:1 21:7,9,15,19 22:23 23:19,23 24:6,22 25:6 25:17,24 26:14 27:3,8 | arguments 16:2 31:3 |
| above-entitled 1:12 61:8 | additional 12:23 | allege 23:14 24:12 56:8 | anomalous 32:2 | artificial 56:4 |
| abridge 47:2 48:10 | Additionally 16:15 | alleged 15:25 56:15 | answer 7:20 11:5 31:25 | ascribe 45:21 53:8 |
| abridged 5:10 | address 12:1 | allegedly 7:22 7:23 | answers 8:25 | ascribing 41:14 |
| abridging 5:3 | adequate 12:1 | alleges 36:12 | antislavery 42:16 | asked 14:16 35:13 50:20 |
| abrogate 15:19 | administration 19:13 | alleging 16:6 | anybody 5:17 18:3,6,9,10,10 18:13 31:22 50:24 | asking 49:13 |
| abrogates 14:13 | adopted 56:24 | allow 44:7 48:5 49:9 | anybody's 22:10 | aspects 20:11 |
| accept 4:19,21 | adopting 53:9 | Amendment 3:17 5:3 6:9,15 7:5,6,9 8:15 9:10 11:12 12:2,9,10,12 12:16 13:9 14:11,14,19,21 15:2,20 16:6 19:6 20:4,17 20:20 21:5,12 22:4,14,20 25:5,12 26:3 26:22 27:23 32:1,4,23 33:22,24 34:3 35:2,4 36:5 37:4,15 39:15 40:8 42:6,11 43:3 44:11,19 45:11,24,25 46:4,11,19 47:3 48:1,9,10 49:9,17 53:20 53:21,23 54:13 54:21 56:10,13 56:18 58:15,18 58:19,21 60:3 60:21 | anytime 24:16 | assert 22:17 29:10 43:20 57:3 |
| act 4:25 10:1 12:7,14,15 25:4,14 41:25 42:12,22 52:5 | adverse 20:4 21:22 51:2 | amicus 1:20 2:7 | anyway 27:5 54:1 | asserting 4:6 9:18 22:13 34:2 57:7 |
| acted 20:21 34:12,12 41:24 42:20,22 | affected 24:16 | | apart 11:11 | assertion 22:20 |
| acting 28:14 34:19 61:2 | affiliated 3:13 7:14 | | apathetic 31:22 36:1 45:15 52:16 56:18 57:1 | assertions 27:13 |
| action 6:21 7:9 11:11 12:22 13:14 14:4 17:23,24 18:5 18:6,14,16,19 19:14 20:4 21:22 26:8 38:24 42:5,16 43:15 47:20 49:11 | affiliation 23:14 24:24 25:8,21 28:13 | | appearance 19:5 | Assistant 1:18 |
| actions 26:15 | affirmative 3:25 4:25 7:18 21:12 22:8 40:7 | | APPEARAN... 1:15 | associate 4:23 5:20 15:3 16:7 51:24 |
| active 26:10 32:6,9,10 40:16 59:18 | affirmatively 20:17 22:2 | | Appendix 17:7 | associated 51:22 |
| actively 58:23 59:17 | agnostic 35:15 60:6 | | application 48:9 | associating 5:16 5:21,23 7:8 |
| activities 8:15 39:15 | agree 37:11,15 39:7 52:12 56:6 | | applications 33:22 | association 3:16 4:2 5:6,12,14 7:7 17:3 28:5 28:15 29:22 31:6,7 33:13 34:24 36:7 37:6,16 40:13 43:4,11 56:9 57:11 59:15,16 |
| activity 4:16 7:21 8:3 9:2 10:14 16:12,25 17:2 18:17 | agreed 6:2 | | applied 34:1 | associational 43:10 60:14 |
| | agreement 32:22 38:19 39:8 | | applies 28:8,9 35:24 43:13,14 | associations 8:4 25:1 |
| | agrees 46:9 | | apply 26:17 51:18 | assume 41:9 |
| | aimed 54:10 | | approach 46:24 | assuming 52:1 |
| | AL 1:7 | | arbitrary 26:7 26:12 | assumption 4:13 52:15 |
| | Alito 7:19 14:3,8 | | areas 17:17 | |
| | | | argued 9:2 | |
| | | | arguing 18:21 | |

| | | | | |
|--|---|--|--|---|
| attempt 14:5,7 39:1 47:3,4,24 48:8,8,13 | Bethesda 1:22 | broader 15:12 38:23 39:3 | 49:8 52:9,15 55:1,5,17 56:4 56:8,11,24 57:1 59:8,14 60:18 61:6,7 | chilling 17:5,14 28:1,7 48:19 52:7 54:9,20 55:2,4 |
| attempting 15:1 50:16 | better 17:11 | broadly 43:14 | cases 7:5 20:18 20:24,25 21:5 22:10 24:16 28:2,8,9 30:19 33:16,21 34:10 35:1 37:9 39:5 44:24,25 46:4 46:11 50:22 53:6,17 55:14 57:6 58:6,8 | chills 18:22 19:14 |
| attempts 47:2 54:3 | bit 38:23 | brought 13:11 15:25 24:17 26:23 | | choice 30:23 35:18,21 60:11 60:15 |
| attention 59:3 | bizarre 52:15,17 57:1 | building 38:3 | | choose 30:21 |
| available 38:21 | blah 18:4,5,5 | | | Circuit 11:3 16:10 56:23 |
| | blatant 47:25 | C | | Circuit's 16:15 |
| | boat 47:18 | C 1:22 2:1,10 3:1 29:5 54:11 54:11 | | citizen 37:5,5 39:20 45:21 |
| | books 47:25 | called 34:22 56:24 | | City 1:6 3:4 17:15 |
| B | born 54:22 | campaign 16:19 17:20 41:2 51:23 53:7 60:12,19 | cause 6:20 7:9 12:22 13:14 18:5,6,13 | civil 11:12 12:7 12:13 14:1,5 14:22,24 15:1 15:14 25:3 39:3 |
| B 54:3,11,11 | boss 11:17 | campaigning 8:9 16:12 60:24 | Ceballos 55:7 | claim 15:11 18:15 30:25 35:2,25 36:6 36:14,18 38:9 38:10 57:11 |
| back 9:19 17:12 20:13 27:15,20 33:9 42:21 50:15 57:25 | boundaries 55:16 | campaigns 9:22 9:23 10:1 | chairperson 17:10 | claiming 15:9 |
| bad 48:18 54:1 | box 44:25 | candidate 4:15 17:23 30:7,20 30:21 | challenge 9:10 | claims 23:12 24:9 36:20 |
| balance 55:19 | boy 17:11 | care 32:16 35:10 36:5 50:21 59:1,2 | challenging 4:15 | clarify 8:17 |
| balancing 10:7 | Branti 7:4 20:15 21:1 29:20 30:19 32:7 33:16 34:6 44:13 50:22 52:8 53:17 | careful 17:12 | chance 48:24 | clear 9:17 17:6 21:11,13,17,19 46:19 48:8 |
| ban 50:2 | Branti-type 43:22 | carries 18:24 | change 45:8 | clearly 4:22 12:10 17:5,14 19:12 60:20 |
| bargaining 11:14 32:22 38:18 39:8 | break 44:4 | carry 18:23 | character 45:8 | client 3:22 7:7 11:11 |
| based 17:24 23:9 26:8 27:6 27:25 | Breyer 46:24 47:5,8,12,15 47:22 48:4,6 48:15,18,22,24 49:1,3,7,12,19 49:22,25 50:16 53:22 54:6,8 54:15,17 | case 3:4,19 4:13 4:18,20,25 5:4 5:9,11,12,15 5:25 6:2 8:17 10:12,16 11:9 15:5,14,25 16:1,16 17:7,8 20:8,11 21:10 24:5,16 29:10 29:22 31:1,3 35:19 36:10,12 37:19,21 40:17 41:7 43:4,5,10 43:11,19,22 44:16,19 46:20 | chief 3:3,9 4:15 5:1,2,11 8:16 9:7,12,13 10:20 11:10,16 11:24 12:3,5 15:22 19:15,17 19:20,24 23:16 23:21 24:2 25:23 26:6 29:3,7 35:14 37:22 38:4,15 39:6 40:21,22 40:23 58:4 59:19,23 61:4 | collective 11:13 32:22 38:18 39:8 |
| basic 53:14,15 | Breyer's 50:11 | | chief's 10:23 58:3 | come 17:12 23:24 44:7 45:4 51:5,8 53:16 58:14 |
| basis 5:8 8:6 36:23 42:13 | brief 14:3 26:24 43:2 56:24,24 | | chill 18:4 25:10 51:22,24 55:15 | |
| beat 42:21 54:19 | briefing 29:9 | | chilled 18:20,20 28:4 40:15 44:1 53:24 | |
| began 4:12 | briefs 16:2 | | | |
| behalf 1:16,22 2:4,11,14 3:8 29:6 59:22 60:24 | bring 9:10 13:11 15:10 22:12 35:2 41:1 47:19 49:10 55:17 | | | |
| belief 19:14 23:15 41:14 42:13 57:24 | brings 33:9 36:11 | | | |
| beliefs 8:4 20:6 20:13 24:13,15 24:15,21 25:1 26:1,4 28:1 33:20 | broad 44:1,5 54:23 | | | |
| believe 11:3 50:16 52:18,22 | | | | |
| believed 22:19 | | | | |
| best 20:8 | | | | |

| | | | | |
|--|---|---|--|---|
| comes 5:9,12 8:18 11:17 31:15 52:15 53:2 56:11 | 13:1,17 15:16 42:15 45:18 50:9 52:19 54:5 | 15:11 16:9 19:25 20:14,19 21:15,20,24 24:22 25:19,22 25:24 26:2,4 27:5 28:20 29:8 30:18 33:14,17 37:16 38:8 39:4 45:19 46:17 47:7 51:16 55:8,19,22 61:1 | decisions 7:1 24:3,7 46:17 declaratory 47:19 49:10 declare 33:6 declaring 59:25 deepens 28:7 defendant 24:17 25:15,17 define 3:18,21 20:2 29:15 defined 20:14 25:19 48:21 defining 3:23 definitely 27:14 demean 53:3 Democrat 31:15 31:20 32:16 36:4 41:10 45:4 50:25 51:8 53:16 Democrats 31:16 34:14 44:6 45:8 51:16,17 demonstrates 20:16 demote 31:18,19 demoted 3:12 4:17 7:1,22,23 19:1,5 22:11 26:20 30:4,5 30:10 38:12 42:20 demoting 51:21 department 1:19 17:15 depend 9:4 describe 48:14 described 6:1 43:2 49:7 describes 53:18 describing 29:19 desk 17:21 detective 42:21 determine 27:1 difference 16:23 | 17:1 19:10 31:10 37:8 60:5,25 different 5:13 8:23 17:16,17 30:16 31:1,2 34:8,10 43:12 43:24 46:25 diminish 12:9 14:11 directly 20:7 22:25 23:1 54:10 disagree 34:21 discharged 7:1 disclaimed 35:20 discriminate 36:22 discrimination 36:12,14 discussed 29:18 33:14 39:2 40:21,25 43:23 56:23 58:2 disfavored 20:6 20:22 dismissal 9:11 dispute 27:9,14 27:19 distinction 35:12 43:18 divided 36:17 doctrinal 29:9 doctrine 5:14 33:23 44:11 53:9,25 54:21 59:6 document 27:10 38:21 doing 5:18 6:10 8:14 16:22 31:17 37:2 46:7 doubt 47:12 downside 58:11 draw 57:14 |
| commit 4:24 committed 6:19 common 16:16 51:14 53:12 commonplace 33:24 company 53:19 compel 33:6 35:9 complaint 26:18 complaints 24:4 completely 35:15 52:16 concern 20:13 23:2 24:14,23 27:20 28:6 40:4 41:6 53:2 53:3 54:23 55:20 concerned 25:10 28:2 38:11 40:1,9 58:7 condition 22:25 46:18 conditions 37:19 conduct 60:14 confused 60:10 Congress 36:19 47:1 50:1,8 connection 57:21 conscience 40:1 41:6 consciously 31:2 consequence 41:3 consequences 51:2 53:10 consider 60:20 considered 16:9 constitution | constitutional 6:17,22,24 11:23,25 20:20 25:18 29:11,14 31:12 40:7 41:20 51:3 52:11 constitutionally 43:7,21 44:21 46:21 contested 34:25 43:1 context 22:24 23:8,10,18,20 24:24 29:24 33:13 37:13 40:4 44:17 contract 21:3 contract-type 26:25 contrary 55:6 contrast 54:18 convey 5:7 cop 54:20 core 8:14 60:20 corollary 28:19 correct 21:23 39:10,16 60:16 couch 45:6 councilman 17:10 counsel 29:3 59:19 61:4,5 country 53:9 59:1 counts 18:19 couple 59:24 course 33:11 44:10 49:12 58:18 60:2 court 1:1,13 3:10,22 4:6 7:25 13:7,8 | Court's 20:11 29:19 43:5,10 46:16 courthouse 51:15 courts 20:18 23:9,25 24:7 24:24 27:17 36:16 covered 60:5 create 13:25 28:17 46:8 created 12:12 creates 28:1 critically 31:1 43:17 cross 38:2 crossing 39:12 curiae 1:20 2:7 19:22 <hr/> D D 1:18 2:6 3:1 19:21 D.C 1:9,19 dangers 28:16 date 47:18 day 47:23 dealing 56:12 decide 27:18 decided 7:5 52:14 57:2 decision 16:15 30:19 35:17 | decisions 7:1 24:3,7 46:17 declaratory 47:19 49:10 declare 33:6 declaring 59:25 deepens 28:7 defendant 24:17 25:15,17 define 3:18,21 20:2 29:15 defined 20:14 25:19 48:21 defining 3:23 definitely 27:14 demean 53:3 Democrat 31:15 31:20 32:16 36:4 41:10 45:4 50:25 51:8 53:16 Democrats 31:16 34:14 44:6 45:8 51:16,17 demonstrates 20:16 demote 31:18,19 demoted 3:12 4:17 7:1,22,23 19:1,5 22:11 26:20 30:4,5 30:10 38:12 42:20 demoting 51:21 department 1:19 17:15 depend 9:4 describe 48:14 described 6:1 43:2 49:7 describes 53:18 describing 29:19 desk 17:21 detective 42:21 determine 27:1 difference 16:23 | 17:1 19:10 31:10 37:8 60:5,25 different 5:13 8:23 17:16,17 30:16 31:1,2 34:8,10 43:12 43:24 46:25 diminish 12:9 14:11 directly 20:7 22:25 23:1 54:10 disagree 34:21 discharged 7:1 disclaimed 35:20 discriminate 36:22 discrimination 36:12,14 discussed 29:18 33:14 39:2 40:21,25 43:23 56:23 58:2 disfavored 20:6 20:22 dismissal 9:11 dispute 27:9,14 27:19 distinction 35:12 43:18 divided 36:17 doctrinal 29:9 doctrine 5:14 33:23 44:11 53:9,25 54:21 59:6 document 27:10 38:21 doing 5:18 6:10 8:14 16:22 31:17 37:2 46:7 doubt 47:12 downside 58:11 draw 57:14 |

| | | | | |
|-------------------------|-------------------------|--------------------------|--------------------------|-------------------------|
| E | 10:8 16:20 | espouse 47:9 | 56:9 | fired 6:10,16,17 |
| E 2:1 3:1,1 | 17:1,22 20:5 | ESQ 1:16,18,22 | expressive 7:21 | 6:18,22 8:21 |
| earlier 24:14 | 20:21 22:18,21 | 2:3,6,10,13 | 9:2 | 11:19 18:9 |
| easily 44:4 | 26:24 27:1,24 | essentially 25:25 | extent 24:25 | 22:10 26:12,13 |
| easy 23:13 | 28:4,10,12,13 | 28:10,18 42:14 | extinguish 55:23 | 26:19 32:19 |
| EEOC 36:17 | 28:21,24 30:6 | ET 1:7 | extremely 46:5 | 41:10 57:18 |
| effect 17:5,14 | 35:4 36:10,22 | evaluate 39:22 | F | fires 36:10 |
| 28:2,7 47:20 | 36:22 37:2 | evaluated 8:8 | facially 34:3 | firing 57:22 |
| 49:8 50:4,12 | 57:9,18 60:22 | evaluating 8:7 | 44:15 | first 3:4,17 5:3 |
| 50:15 52:22 | employer's 19:1 | evening 32:14 | fact 7:13 8:12,24 | 6:8,15 7:5,5,9 |
| 54:9,21 55:4 | 55:10,13 | event 9:3 | 9:1,8 11:6 | 8:14 9:10 |
| effective 47:18 | employment | everybody 44:6 | 12:11 15:20 | 11:11 12:2,9 |
| effects 48:19,19 | 12:15 22:23 | 46:9 54:12 | 16:8 17:9 | 12:10,12,16 |
| 54:24 55:2 | 26:8 28:23 | evidence 11:8 | 18:25 19:8 | 13:9 14:11,13 |
| effort 49:10 | 29:24 37:13,18 | 24:10 | 27:13 30:10 | 14:19,21 15:2 |
| either 4:23 14:2 | 38:24 43:10,15 | exact 28:21 38:7 | 38:11,23 44:13 | 15:20 16:6 |
| 50:19 | encourage 32:5 | exactly 6:14 | 49:13,15 60:18 | 19:6 20:3,17 |
| election 17:10 | 32:8 | 18:18 24:13 | facts 8:7,8 27:6 | 20:17,20 21:5 |
| Elrod 3:24 4:4 | endorsed 7:16 | 26:5 28:1 | 27:12 39:10 | 21:12 22:4,7 |
| 6:4,6,7,8 7:2,4 | engage 4:2 7:21 | 38:22 | 57:14 | 22:13,20 25:4 |
| 16:9,13 23:12 | 10:14 16:11 | examine 24:25 | factual 27:9 | 25:11 26:3,21 |
| 24:16,16 28:2 | 19:2 28:15 | example 30:3 | failing 7:22 | 27:22 31:3 |
| 28:19,22 29:19 | 35:3 41:12 | 49:21 | fails 49:15,15,22 | 32:1,4,23,24 |
| 30:19 32:6 | 43:7 44:20 | examples 47:6 | 49:22 | 33:22,24 34:2 |
| 33:16 34:6 | engaged 3:16 | exclusive 14:10 | fair 4:5,8,9 | 35:2,4 36:5 |
| 43:22 44:13 | 4:16 8:9 15:23 | excuse 33:3 | fairly 23:13 | 37:4,15 38:18 |
| 50:22 52:8 | 16:25 18:17 | exercise 20:17 | far 29:12 | 39:14 40:8 |
| 53:16 | 19:2,9 21:11 | 21:12 22:4,8 | favor 6:9,9 38:1 | 42:6,10 43:3 |
| employee 4:1,23 | 28:12 36:7 | 51:3 53:21 | favoring 6:12 | 43:19 44:11,19 |
| 10:14 12:20 | 40:13 43:21 | exercised 21:5 | Federal 13:1,7,8 | 45:11,13,24,25 |
| 13:16 20:16 | 45:1 46:20 | exercising 19:6 | 13:17 15:11 | 46:4,11,19 |
| 27:25 28:14,23 | 60:1,20 | 19:8 31:12 | 50:2 | 47:3 48:1,8,10 |
| 30:17 32:13 | engages 27:2 | 42:6 52:11 | Federalism | 49:9,17 53:20 |
| 34:8 35:1 | engaging 5:5,6,6 | 60:19 | 37:17 | 53:21,22 54:13 |
| 40:15 46:19 | 8:3 17:2 26:21 | exist 15:5,6 | felony 6:19 | 54:21 56:10,13 |
| 56:8 57:6,10 | 30:10 32:23 | existed 10:20 | fiction 32:15 | 56:18 58:15,18 |
| employee's | 34:23 42:23 | expand 23:7 | fight 29:9 | 58:19,20 60:3 |
| 55:14 | 59:16 60:14 | expect 38:23 | filed 24:4 | 60:21 |
| employees 3:11 | entering 37:25 | expects 28:4 | filings 27:10 | fish 43:24 |
| 9:22 12:20 | 39:13 | explain 30:1 | fill 38:13 | fix 45:18 |
| 17:5,16 28:3 | entire 45:8 | 32:1 | finance 53:7 | flood 23:3,11,17 |
| 30:24 38:12 | entirely 32:6 | exploit 28:10 | find 25:4 44:19 | fluke 49:15 |
| 43:14 44:2 | 34:8 43:24 | expressing 5:22 | finish 49:24 | 54:11 |
| 53:14 | entitled 39:7 | 6:15 | fire 13:16 18:3,9 | focus 30:14 |
| employer 3:15 | environmenta... | expression | 31:19,19 32:9 | 36:22 37:4 |
| 6:19 8:1,12,18 | 57:8 | 34:24 40:14 | 44:5,7 45:6 | focuses 37:5 |
| | equally 28:24 | 42:13 55:17 | | following 37:20 |

| | | | | |
|-----------------------|-------------------------|-------------------------|------------------------|-------------------------|
| forms 38:17 | 43:25 44:12 | 48:12,16,21 | gun 57:8 | 56:5 58:1 |
| four 10:24 | 48:9 55:4 | 49:1,5,18,20 | | hypotheticals |
| framed 35:19 | generally 54:3 | 49:24 50:10,19 | H | 37:21 |
| free 4:7 6:25 | getting 8:19 9:3 | 51:1,6,9,11,14 | hand 22:5 | |
| 26:7 28:25 | 44:24 58:1 | 51:25 52:3,6 | hanging 17:13 | I |
| 34:25 35:2 | Ghaly 56:25 | 52:18,23 53:1 | happen 11:17 | idea 25:2 34:10 |
| 37:6,6 | GINGER 1:18 | 54:4,7,14,17 | 26:5 43:20 | 34:11 55:9 |
| freedom 5:3,10 | 2:6 19:21 | 55:6 56:6,22 | happened 6:11 | identical 12:22 |
| 7:6,7 47:2 | Ginsburg 10:9 | 57:16,20,23,25 | 6:23 21:21 | identified 29:16 |
| 48:11 | 10:11,15 13:19 | 58:11,13 59:7 | 44:13 | identify 30:17 |
| friend 40:20 | 13:22 19:4 | 59:10 | happens 34:6 | 45:5 58:8 |
| 41:3 60:13 | 20:24 26:23 | good 25:2 36:18 | 47:23 48:25 | ignorant 22:6 |
| Frost 1:16 2:3 | 27:6 30:1 31:9 | governed 5:13 | 53:5 | ill 19:12 |
| 2:13 3:6,7,9,20 | 36:9,16 42:2,4 | government 4:7 | hard 35:13 | ill-motivated |
| 3:23 4:9,21 | 42:9,19,25 | 6:19 8:2,2 9:21 | Hatch 10:1,2 | 28:25 |
| 5:11,19 6:4,7 | give 12:9,23 | 10:4,6 21:3 | 52:5 | imagine 12:18 |
| 6:12,24 7:10 | 14:10 35:12 | 24:20 25:13 | headquarters | 28:11 37:20,22 |
| 7:25 9:6,12,14 | 40:17 | 32:5 33:2,6 | 38:4 | 37:24 40:20 |
| 9:24 10:2,6,10 | given 31:4 | 34:11,12,15,19 | hear 3:3 17:20 | 41:18 |
| 10:15,19 11:15 | go 16:18 17:7 | 34:22 35:9 | heard 10:25 | impact 47:23 |
| 11:22 12:3,6 | 49:8 50:4,15 | 37:5 38:21 | hearing 60:4 | impermissible |
| 12:17,21 13:3 | goes 50:12 | 39:14,22 40:6 | Heffernan 1:3 | 28:22 34:13,15 |
| 13:7,13,21,24 | going 16:18 18:2 | 41:14,17,21 | 3:4 8:10 12:24 | 46:7 61:2 |
| 14:7,9,17,24 | 18:9 24:11,13 | 42:4,5,11,12 | 16:11,21 17:2 | implement 50:2 |
| 15:3,6,10,18 | 30:21 36:6 | 42:17,18,20,22 | 17:11 18:25 | important 33:15 |
| 15:23 18:7,12 | 38:5,5 44:7 | 44:1,22 45:20 | 19:11 35:13 | 35:11,23 43:17 |
| 18:15,24 19:7 | 48:12,13,22 | 46:7,8 50:24 | 37:23,25 40:22 | 46:16 52:7 |
| 19:18 30:3 | 49:8 50:24 | 53:3 55:23 | 40:25 60:1 | impossible |
| 59:20,21,23 | 51:17 53:9 | 58:16,21 59:4 | held 24:12 54:1 | 45:13 |
| 60:16 | 55:15,24 56:20 | 59:11,12 61:2 | help 26:3 49:25 | improper 26:20 |
| fundamental | 56:21 57:5 | government's | highly 56:4 | inaccurate |
| 46:10 | 58:5 60:18 | 8:6 46:12 | hire 51:16 | 26:19 |
| funds 50:2 | Goldstein 1:22 | 58:17,23,24 | hiring 51:21 | incentive 24:17 |
| further 29:2 | 2:10 14:23 | 59:5 | history 55:21 | incidents 8:14 |
| Furthermore | 29:4,5,7 30:2 | grabbed 37:24 | hold 45:20,22 | included 14:9 |
| 16:10 | 30:13 31:24 | Grabowski's | 47:17 | including 29:15 |
| | 32:12,17,20 | 14:3 | holding 46:14 | 49:9 |
| G | 33:4,8 34:21 | gravamen 26:18 | honest 28:9 | incumbent 4:16 |
| G 3:1 | 35:11 36:9,16 | Great 54:17 | Honor 11:5,15 | independent |
| gaining 36:13 | 36:24 37:1,7 | greater 37:16,17 | Honors 53:6 | 14:15 34:17 |
| gap 38:14 | 37:10 38:17 | grievable 38:25 | hurt 25:15,18 | 36:4 |
| Garcetti 46:22 | 39:9,16,24 | ground 53:12 | hurts 22:11 | indicated 16:13 |
| 55:7,12 | 41:16,25 42:3 | grounds 3:12 | hypothetical | 29:12 |
| gathering 8:11 | 42:8,14,25 | 7:2 49:10 | 16:17 30:15,24 | individual 25:12 |
| 16:19 17:19 | 44:9 45:12,23 | guarantees 7:6 | 34:14 35:12,18 | 30:22 33:19 |
| general 1:19 | 46:15 47:4,7 | guess 44:3 | 39:11 49:3 | 34:5,8,22,23 |
| 33:17,25,25 | 47:11,21 48:4 | guide 54:25 | 50:11 54:22 | 35:5 39:13,19 |

| | | | | |
|---|---|--|--|--|
| 41:4 42:15 43:7,15,20 44:14 46:20,23 individual's 14:5 individuals 7:17 10:24 individuals' 53:4 inequitable 38:25 inference 57:15 influence 35:21 injured 20:7 22:25 54:12 injures 28:22 injury 39:21 50:14 innocent 30:11 inquire 21:20 33:19 34:4,7 36:8 44:14 inquired 29:17 inquiries 55:18 inquiry 4:7 33:10 35:5,24 36:2 43:6 51:19 insist 10:4 39:14 instance 14:18 18:25 intending 8:13 intent 8:12 28:21 50:23 54:2 interest 37:17 39:21,25 interests 10:7 interfere 40:5 involved 22:8 34:2 41:2 53:17 57:7,10 57:18 60:12 involving 10:16 55:21 Iqbal 24:8 irrespective | 34:20 issue 3:19,20 10:9,11,12 12:2 19:12 20:15 43:9,12 43:16 55:3 56:14 issues 17:17 <hr/> J <hr/> J 1:3 January 1:10 JEFFREY 1:3 Jersey 1:7 3:5 12:7,14,21 13:2,6,10,13 13:18,23,25 14:4,13 15:13 15:15,16,17,18 15:24 26:12,16 38:22 39:3 55:24 job 25:21 26:15 jobs 31:17 51:18 judgment 11:2 24:8 27:10 39:15 47:19 49:10 judgments 40:3 judicially 38:20 jurisdictions 17:16 Justice 1:19 3:3 3:9,18,21 4:3 4:10,11 5:2,11 5:16,19,20 6:1 6:6,8,14,25 7:3 7:19 8:16 9:7 9:12,13,16,25 10:4,9,11,15 10:17 11:10,16 11:24 12:3,5 12:14,18,25 13:4,10,15,19 13:22 14:3,8 14:12,20,25 15:4,7,8,12,22 | 18:1,8,12,13 18:18,24 19:4 19:15,17,20,24 20:1,8,24 21:4 21:8,13,17 22:9 23:16,21 24:2,14,19 25:2,9,23 26:6 26:23 27:6 29:3,7,16 30:1 31:9,13 32:8 32:13,18,20 33:1,2,5,8 34:9 34:25 35:6,8 36:1,3,9,16,21 36:25 37:2,8 37:11,12 38:15 39:2,6,11,17 39:18,25 40:10 41:8,16,23 42:1,2,4,9,10 42:19,25 43:13 44:3,9 45:2,19 45:23 46:3,15 46:24 47:5,8 47:12,15,22 48:4,6,15,18 48:21,24 49:1 49:3,7,12,19 49:22,25 50:7 50:11,13,16,18 50:20 51:4,7,9 51:10,12,20 52:1,3,4,17,21 52:24 53:14,22 54:6,8,15,17 55:1 56:1,3,7 56:22 57:13,17 57:20,21,24 58:10,13 59:11 59:19,23 60:9 60:16 61:4 <hr/> K <hr/> Kagan 31:13 33:1 34:9,25 35:8 36:3 | 37:12 44:3,9 45:2 46:3,15 50:20 56:1 58:10,13 59:11 keep 49:6 Kennedy 3:18 3:21 4:3,10,11 6:1 9:16,25 10:4 20:8 24:14,19 25:9 29:16 32:8,13 32:18,20 33:2 33:5,8 35:6 36:1 39:11,17 39:18,25 40:10 41:8,16,23 42:1 43:14 45:19,23 53:14 Kennedy's 20:1 kettle 43:24 kind 11:13 43:18 56:16 kinds 48:17,19 53:6 57:5 knew 11:6 27:16 know 8:19,23 11:13,18 13:23 23:6,8,16 26:6 26:10 27:21 28:3 30:22 32:2,14,15 35:3,14 37:21 41:8 44:20 48:3,6 49:5 50:18 55:1,5 59:3 60:10 known 40:19 knows 28:12 <hr/> L <hr/> lacked 21:23 22:2 lacks 16:16 Laughter 32:11 47:14 49:4 50:17 52:20 56:2 59:9 | law 13:2,6,11,13 13:18,18,23,25 14:4,13,15,18 15:1,13 20:12 26:12,16 32:21 33:24 38:16 39:3 47:1,1,8 47:13,20,24 49:8 50:1,4,8 50:14 53:25 56:5 laws 15:17,18 36:19 38:13 lawsuit 22:12 41:1 lawsuits 22:13 23:3,11,17 lawyer's 38:5 layers 53:13 lead 26:3 leave 11:21 47:18 51:15 left 59:20 legislature 47:1 let's 8:18 11:16 34:13 36:9 41:9 47:5 liable 28:24 life 34:18 lights 11:18 liked 22:21 litigation 16:5 23:7 little 25:16 38:23 60:5 local 9:21 40:6 55:23 logic 28:7 logical 29:23 long 44:21 46:13 longer 45:1 look 4:11 8:5 27:9,18 40:16 41:1 43:18 55:8,14 looked 8:1 23:23 24:6 33:16 |
|---|---|--|--|--|

| | | | | |
|-------------------------|-------------------------|-------------------------|--------------------------|-------------------------|
| looking 24:2 | meeting 9:3 | 53:11 | 33:14 43:23 | 19:11 |
| looks 23:25 | members 10:20 | need 5:14 7:10 | 52:8 53:18 | outside 37:13 |
| loophole 28:10 | mentions 24:14 | 7:11 19:2 | objection 26:9 | overbreadth |
| 28:17 | meritless 23:3,3 | 40:12 51:13,18 | oblivious 31:8 | 33:22 44:11 |
| lose 15:5 43:5 | 23:11,17 44:24 | 55:16 | obviously 22:3 | 49:9 54:21 |
| lot 41:17 43:14 | message 5:7 | neither 5:18 7:7 | occur 29:23 | oversight 4:7 |
| 48:18 55:25 | 28:14 | 31:20 | office 10:24 | 24:15,20 |
| 59:1 | millions 54:10 | neutral 9:22 | 31:15,16 38:6 | |
| lots 53:8,23 | 54:19 | 30:5,18,20 | 40:21 45:4,9 | P |
| 59:12 | mimics 12:7,17 | 45:16 52:14 | 58:3 | P 3:1 |
| lower 27:17 | 13:14 | 59:14,25 60:4 | officer 8:10 | Pa 1:16 |
| | mind 30:16 | 60:6,13 | 12:24 16:20 | Pacer 27:11 |
| M | 54:18 | neutrality 10:5 | officers 10:25 | page 2:2 17:8 |
| magically 45:14 | minute 59:20 | 10:13 27:13 | 16:17 | pamphlet 17:21 |
| maintain 16:5 | misperceived | never 7:4 11:1 | officials 21:24 | parade 38:1 |
| making 9:15 | 8:12 | 15:25 29:21 | oh 9:2 42:3 | 39:13 |
| 39:22 | missed 20:25 | 34:18 44:16 | 46:12 49:1 | part 9:23 10:1 |
| management | mistake 8:24 9:8 | 47:20 53:19 | okay 9:13 10:15 | 18:16 43:23 |
| 40:6 | 16:11 26:8,9 | 55:22 | 12:5 38:10 | 46:5 |
| managing 37:18 | 28:9 54:1 | New 1:6 3:5 12:7 | 40:20,23 41:18 | particular 18:19 |
| marginally | 60:22 | 12:14,21 13:2 | 41:25 47:10,12 | 23:14 24:23 |
| 51:24 | mistaken 19:1 | 13:6,10,13,18 | once 34:12,15 | 35:7 41:9 |
| MARK 1:16 2:3 | 23:9 26:13 | 13:23,25 14:4 | one's 8:4 17:25 | party 3:13 5:24 |
| 2:13 3:7 59:21 | 27:25 | 14:13 15:13,15 | one-off 43:15 | 6:9,10,13 7:15 |
| materiality 46:1 | mistakenly 3:14 | 15:16,17,18,24 | 52:9 53:17 | 7:15,16 21:24 |
| matter 1:12 3:12 | money 50:5 | 26:12,16 38:22 | 55:3 | 23:15 35:25 |
| 3:14 7:13 14:1 | morning 3:4 | 39:3 55:24 | operating 42:11 | pass 28:25 47:1 |
| 15:21 16:4 | mother 5:8,21 | news 32:14 | opinion 29:19 | 47:1,13,16 |
| 31:17 46:13 | 16:23 | nice 41:18 | 48:7 53:18 | passed 49:14 |
| 50:20 55:10 | motion 11:2,3 | night 11:19 | opponent 5:1 | 50:1,8 |
| 57:5 61:8 | motions 11:2 | nonaffiliated | 7:24 | Paterson 1:6 3:5 |
| matters 34:16 | motivation | 3:14 | opportunity | 17:16 |
| mayor 7:23 18:2 | 19:10 37:23 | nonassociate | 44:18 | patronage 3:12 |
| 35:14,16 52:13 | 38:7 56:15 | 4:24 | opposed 55:3 | 6:25 7:1 55:22 |
| mayor's 4:25 | motive 8:1,1,3 | nonassociation | 58:24 | pay 59:2 |
| 7:24 | 17:4,24 46:12 | 17:4 | opposes 46:9 | people 10:23 |
| mayoral 30:7 | multiple 53:13 | nonassociations | opposition | 18:4,21,22 |
| Md 1:22 | | 8:5 | 56:24 | 28:12 30:3 |
| mean 6:15 7:19 | N | normally 53:24 | oral 1:12 2:2,5,9 | 31:20 32:3,5 |
| 12:9 13:24 | N 2:1,1 3:1 | noticeable 38:20 | 3:7 19:21 29:5 | 34:1,2 40:1 |
| 16:16 17:6 | narrow 28:19 | number 22:1 | order 24:8 | 43:25 44:7 |
| 25:2 26:11 | nature 24:25 | | ordinary 30:9 | 45:14 47:17 |
| 35:8 47:12 | necessarily | O | orthodoxy 28:4 | 51:5 53:8,24 |
| 49:16 53:3 | 25:25 | O 2:1 3:1 | ought 33:21 | 54:10,19 59:1 |
| 56:14 57:17 | necessary 3:25 | O'Hare 20:15 | 35:12 37:14 | perceived 3:15 |
| 58:13 | 16:13 33:19 | 21:2 24:23 | 40:9 | 17:1 19:7 57:9 |
| meant 54:2 | 34:7 46:18 | 25:24 29:19 | outcome 16:24 | 60:23 |

| | | | | |
|--------------------------|-------------------------|--------------------------|------------------------|------------------------|
| perceives 8:2 | 36:6 40:12,19 | 28:4,13 29:17 | pretty 53:10 | 46:19 47:9 |
| perception | 44:25 52:12 | 29:22 30:10,23 | prevail 4:19 | 55:10,13,13 |
| 18:17 19:1 | 53:15 56:12 | 31:20 33:11,12 | prevent 52:5 | 57:6,9 |
| 23:10 26:21 | plaintiff's 25:1 | 33:19 35:18 | 58:15,21 | punish 59:4 |
| 27:25 | 26:4,18 | 39:23 40:14 | primarily 23:4 | punishing 58:16 |
| person 9:9 30:8 | plaintiffs 7:11 | 41:14 42:23 | private 40:2 | 58:21 |
| 32:9 34:16 | 16:14 21:10,22 | 44:15 45:5,9 | probe 26:4 | pure 8:24 |
| 35:9,9 39:12 | 23:14 24:11 | 47:9 50:3 | probing 20:13 | purpose 20:5,22 |
| 41:12 42:5,6 | 44:24 | 52:10 53:4,8 | 24:15 26:1 | 25:14 26:20 |
| 42:20,23 45:5 | plausible 24:10 | 53:18 55:21 | problem 44:22 | 34:13,15 35:20 |
| 49:2 51:23 | play 53:2 | 56:16 57:24 | 52:25 53:20,23 | 61:2 |
| 52:10 53:25 | please 3:10 | 58:2 59:15,15 | problems 52:19 | purposes 52:10 |
| 54:20 56:17 | 19:25 25:23 | 60:1 | proceed 13:8 | pursuant 3:24 |
| 58:16,16,22,22 | 29:8 | politically 26:10 | proceeded 12:11 | pursue 36:6 |
| 58:23,25 59:4 | pluck 45:14 | 30:5,18 31:8 | 13:7 | pursued 14:18 |
| 59:4,13 | point 9:14 11:24 | 31:22 32:5,9 | progeny 3:24 | pursuing 59:17 |
| person's 44:14 | 21:8 23:1,6 | 32:10 36:1 | 16:9 | put 17:21 42:21 |
| personal 40:2 | 32:6,20 36:18 | 40:16 45:15,16 | prohibiting | putting 4:5 |
| perspective | 46:13 48:2 | 51:22 52:14,16 | 56:16 | |
| 40:11 46:25 | 52:7 54:16 | 56:25 59:14 | promote 50:24 | <hr/> Q <hr/> |
| persuaded 59:8 | 58:6,19 60:17 | politics 34:18 | promoted 7:17 | question 11:5 |
| Petitioner 1:4,17 | pointed 37:17 | 41:19 55:23 | 18:11 22:11,15 | 14:12,14,16 |
| 1:21 2:4,8,14 | points 59:24 | 56:19,20 | 22:18 51:5 | 20:2 22:24 |
| 3:8 19:23 20:3 | police 4:15 | position 7:11,12 | promotion 7:12 | 24:13 25:7,19 |
| 27:4,15,22 | 16:17,19 17:15 | 10:8 16:4 | proposed 55:9 | 29:13 31:10,25 |
| 39:7 40:24 | 35:14 37:22 | 27:21 28:8 | proposition 4:5 | 33:9 35:24 |
| 59:22 | 38:4 40:22 | 35:7,24 36:17 | 4:19,22,22 5:4 | 42:20 48:2 |
| Petitioner's 43:2 | police's 40:21 | 41:9,13 60:7 | 6:5 20:9 | 52:7 55:12 |
| Philadelphia | policies 33:17 | possible 31:16 | protected 3:16 | 56:3,14 |
| 1:16 | policy 10:7,13 | 34:14 | 4:17 14:1 17:2 | questions 19:19 |
| philosophy | 10:16,18,19,22 | possibly 7:8 | 26:21 30:23 | 29:2,11 |
| 47:10,17 | 10:22,25 11:1 | potato 45:6 | 43:8,21 44:21 | quite 31:2 36:3 |
| pick 16:18,18,22 | 11:6,7 26:25 | potentially | 46:21 55:11 | 56:10 |
| 17:9 37:23 | 27:7,13,16 | 27:17 | 56:9 60:3,5 | <hr/> R <hr/> |
| picked 4:14 8:11 | 31:25 33:18 | practically | protections | R 3:1 |
| 17:21 | 34:3 43:13,25 | 45:13 | 11:12 12:19 | raise 24:13 |
| Pickering 5:15 | 44:12,15 50:23 | precedents 43:6 | 41:5 46:6 | raised 11:1 |
| 43:6,19 | 51:1,15 52:2 | precise 30:14,24 | 53:13 59:13 | 54:16 |
| picking 5:7,21 | 54:23 55:4 | prefer 45:9 | protects 12:15 | raises 27:21 |
| 60:21 | 56:15 | pregnant 36:11 | 58:18 | rare 56:10 |
| piece 35:23 | political 3:16 | 36:13,15 | provides 14:4 | read 12:25 |
| place 19:11 22:7 | 4:2 5:23,23 6:9 | presented 8:18 | provision 10:3 | readily 6:2 |
| 47:9 48:20 | 6:10,13 8:3,10 | 60:10 | 39:1,8 42:16 | real 29:13 40:4 |
| 52:2 | 8:20 9:3 10:14 | preserved 27:18 | public 3:11 4:1 | 51:25 55:20 |
| plaintiff 20:19 | 16:12 17:19 | President 50:9 | 4:23 29:24 | 57:12 |
| 22:24 29:10,12 | 19:9 20:6,23 | press 61:3 | 37:13,18 38:11 | really 16:8 |
| 34:5 35:19 | 25:8,20 27:2 | pressure 35:21 | 38:20 43:10 | |

| | | | | |
|---|---|---|--|---|
| 30:14 33:15 35:10 40:22,24 44:22 46:12 49:25 52:6,18 52:22 58:4,25 reason 6:16,18 6:23 18:20 22:14,18 26:13 26:13,19 29:23 30:9,22 32:3 37:14 40:9,25 45:9 46:5 48:4 53:23 57:1 60:25 reasonable 25:21 reasons 22:1 23:5 46:7 57:2 reassigned 58:4 REBUTTAL 2:12 59:21 recognize 29:21 36:19 38:9 55:8 recognized 23:9 24:23 28:20 29:21 33:12 40:12 record 38:20 redistricting 53:7 refer 15:16 reference 11:7 referring 23:22 refers 15:15 refused 22:3 refuses 35:15 regarded 36:20 40:16 53:19 regarding 10:22 regimes 38:13 register 56:21 relate 37:21 relied 55:2 relief 13:1 38:16 38:17 39:7 remain 30:19 | 52:14 remaining 19:16 remand 27:1,4 remedies 12:1,4 remedy 11:10 14:15,17 remember 35:6 41:21 46:1 53:15 59:13 remove 31:19 Replace 45:7 reply 43:2 reported 24:3,7 Republican 7:15 7:15,16 18:3 18:10,11 21:24 23:15 31:21 32:16 34:17 36:5 41:10 50:21,25 51:12 Republicans 22:22 31:19 requirement 22:7 25:21 46:2 requires 42:16 requiring 16:11 reserve 19:15 resolve 27:19 respect 5:12,13 7:12 10:20,21 12:21 14:1 16:3,5,13 19:10 23:12 26:15 59:25 60:25 respond 23:1 Respondents 1:23 2:11 16:1 29:6 Respondents' 27:12,21 28:8 28:17 restatement 4:4 result 28:5,23 rid 24:9 31:21 58:1 | right 3:11,19,22 3:23 4:1,6,23 5:25 6:9,17,22 6:24 7:6 9:17 12:8 13:8 14:4 14:10,21,22 15:1,3,8,10 16:4,6,7,7 20:2 20:4,14 21:5,6 22:6,14,21 24:20 25:6,7,7 25:11,12,16,19 25:20 26:1,7,7 26:11,16 27:23 28:19 29:11,14 29:16,21 31:12 32:17,19,21,22 32:23 33:6,10 33:11 34:22 35:5 36:3,24 37:1,6 39:2,14 39:20 40:7,12 40:24 41:17,20 45:17,21 46:16 47:21,25 48:16 51:7 52:11 53:16 56:18,22 56:25 57:3,23 58:3 59:14,15 59:17 60:19 rights 12:7,10 12:23 13:25 14:5,11,14,19 14:24 15:1,13 15:15,16,20 17:3,25 19:6,8 20:17 22:4 34:3 37:15,16 39:3 41:4 42:7 42:15,15 51:3 53:21 57:7,8 risk 58:11 rival 30:7 ROBERTS 3:3 5:2 8:16 9:7,13 11:10,16,24 12:5 15:22 | 19:17,20 23:16 23:21 24:2 25:23 26:6 29:3 38:15 39:6 59:19 61:4 rooted 55:20 rule 27:4 28:17 33:25,25 43:12 44:5,23 53:14 53:15,17 55:8 56:23 rules 52:8 55:15 running 46:4 59:3 Ruritania 50:3 Ruritanianism 47:10 Rutan 7:11 16:14 20:15 21:2,10 <hr/> S <hr/> S 2:1 3:1 saw 8:19 17:22 saying 10:10 18:2 22:16 24:19 28:18 31:14,18 39:25 41:1 44:6,10 44:10 45:2,3 46:12 53:5 says 6:8 8:19,22 11:17 13:5,15 13:15,18 14:4 14:23 17:11,11 21:24 27:15 31:15 32:4,13 35:2 36:6 38:24 40:19 42:11 44:5,20 46:22 51:16 56:25 Scalia 5:16,19 5:20 6:6,8,14 6:25 7:3 12:14 12:18,25 13:4 | 13:10,15 18:1 18:8,12,13,18 18:24 21:4,8 21:13,17 22:9 25:2 36:21,25 37:2,8,11 42:10 50:7 52:17,21,24 55:1 school 56:5 second 30:17 31:6 39:1 45:17 secure 24:20 see 17:24 24:4,7 30:20,20 33:1 34:9 41:6 43:25 44:1 46:3 60:5 seek 22:3,5 seemingly 7:23 seen 23:10,17 sees 61:1 send 28:13 sense 16:16,24 25:18 27:19 30:2,8 31:11 31:11 39:4 51:14 53:4 60:6 separate 26:1 serious 23:2 48:2 service 11:12 12:13 14:2 25:4 set 58:6 settled 43:5 sex 36:11,14,25 shalt 42:12,12 share 58:17,22 59:5 shoot 54:2,3 show 20:19 22:13,17,20,21 57:14,21 showing 20:21 |
|---|---|---|--|---|

| | | | | |
|-------------------------|-------------------------|--------------------------|------------------------|-------------------------|
| shows 17:14 | 52:1,4 57:13 | 2:7 16:20 | 20:12 21:23 | tangent 50:13 |
| side 27:15 31:2 | 57:17,20,21,24 | 19:22 39:20 | 22:2,3,6 35:14 | technically |
| 35:1 40:10 | 60:9,17 | 45:20 55:21 | 35:15,17 58:2 | 31:25 |
| 44:18 45:25 | sounds 4:12 | statute 6:21 | supported 11:8 | technique 24:1 |
| 57:2 | 32:2 | 12:22 13:13 | 60:13 | tell 38:19 51:13 |
| sign 4:14 5:8,22 | Spagnola 5:1 | 15:15,24 48:9 | supporter 30:4 | 55:6 |
| 8:11,20 9:4 | 8:13 16:21 | 48:13,22 54:9 | 30:6 31:4 | telling 17:8 |
| 16:18,19,22 | 30:4 31:4 38:1 | 54:19,23 | 40:20 52:13 | 58:20 |
| 17:9 37:24,24 | 38:3 40:20 | statutes 36:21 | supporting 1:20 | tenet 46:10 |
| 40:18 46:14 | 52:13 58:2 | statutory 14:4 | 2:8 4:14 7:15 | terms 29:15 43:3 |
| 58:1 60:21 | 60:2,12,24 | 23:8,20 | 7:24 16:20,22 | 54:20 |
| significant 41:3 | speak 7:10 | stems 16:8 | 19:23 60:2 | test 25:8,20 |
| 43:12 58:12 | 17:20 | stifle 17:3 | suppose 5:21 | testified 60:11 |
| signs 17:13 | speaker 17:20 | stopped 37:25 | 31:14 32:13 | testimony 10:22 |
| simple 37:20 | speaking 5:17 | 38:4 | 46:25 | 17:7 |
| 51:20 60:25 | 7:8 | stopping 39:12 | suppress 8:4 | tests 26:3 |
| simply 9:7 20:20 | specific 3:13 | stops 44:24 | 17:4,24 19:14 | text 13:19,22 |
| 22:5 28:25 | 33:15 35:20 | straight 45:3 | suppressing | Thank 19:19 |
| sir 32:12 | specifically | strand 46:5 | 20:6,22 | 29:3 59:19,23 |
| sites 38:21 | 23:13 29:24 | strange 12:15 | Supreme 1:1,13 | 61:4,5 |
| sitting 43:11 | speech 5:3,5,10 | 13:18 59:6 | sure 5:9 13:24 | theory 9:4 |
| situation 28:11 | 5:13,13 7:6 | street 38:2 39:12 | 26:17 31:13 | thing 27:17 39:1 |
| 50:14 | 18:2,6,7,8 | strong 46:5 | 39:22 44:3 | 41:19 43:19 |
| six 47:17 | 34:25 35:2,3,9 | stronger 41:7 | surprise 37:10 | 44:23 46:22,25 |
| slightly 30:16 | 36:7 37:6 | subject 25:7,20 | surprised 15:14 | 54:1 |
| small 58:9 | 42:13 43:3 | 26:1 57:11 | survey 24:4 | things 18:1,4 |
| Smith 8:18,19 | 46:8 47:2 | subjected 35:18 | sweeping 33:18 | 41:17 45:12 |
| 8:22 | 48:11 53:24 | submitted 61:6 | sympathetic | 46:7 55:19 |
| Solicitor 1:18 | 54:10 55:11,13 | 61:8 | 38:10 | 56:13 |
| solve 52:19,24 | 55:15,18 | substantive | | think 10:6 14:16 |
| somebody 31:14 | squash 17:3 | 13:25 15:13 | T | 17:18 20:3,10 |
| 34:17 36:4 | staff 10:21 | substitute 47:15 | T 2:1,1 | 20:12,14 21:9 |
| 44:7 46:13 | stand 6:4 | succeed 48:13 | take 4:13,18 | 22:23,24 23:1 |
| 58:14 | standard 24:1 | 48:22,25 49:13 | 7:11,12,18 | 23:2,13 24:11 |
| someone's 42:13 | 43:19 | 49:14 | 9:23 10:1 | 24:22 25:6,17 |
| somewhat 15:14 | standing 34:5 | sued 58:5 | 16:17 23:6 | 25:22,23 26:2 |
| 23:8 | standpoint | sufficient 46:18 | 36:9 37:13 | 26:14,17,24,25 |
| sorry 10:17 | 39:23 | suggesting 26:2 | 40:11,18 57:25 | 27:3,3,7,9,16 |
| 13:21 14:20 | start 20:1 29:20 | suits 23:9 | taken 18:16,19 | 27:21,22,24 |
| 30:13 33:4 | state 12:6,7,13 | summary 11:2 | 20:4 21:22 | 28:6,16 29:11 |
| 51:11 57:13 | 12:15,19 13:16 | 24:8 27:10 | 50:5 | 30:15 36:18 |
| sort 41:19 56:4 | 14:15,18,25 | supervisor 3:15 | takes 47:20 | 38:8 39:13,24 |
| Sotomayor | 32:21 38:22 | 40:11 | talk 40:5 42:17 | 41:21 43:1,17 |
| 10:17 14:20,25 | 42:16 | supervisor's | talking 13:23 | 44:12 45:3,13 |
| 15:4,7,8 50:13 | statement 4:8,9 | 40:14 | 25:25 40:3 | 45:16,23,25 |
| 50:18 51:4,7 | 27:12 52:21 | support 4:25 | 43:13 50:3 | 46:15 48:3 |
| 51:10,12,20 | states 1:1,13,20 | 7:22 8:13 | talks 5:3 54:20 | 49:13 50:19 |

| | | | | |
|---|---|---|--|---|
| 51:16 52:6 53:1,12 54:9 54:15 thinking 9:20 thinks 28:15 30:6 34:24 36:11 40:22 41:17 42:6 44:22 45:25 Third 11:3 16:10,15 56:23 THOMAS 1:22 2:10 29:5 thou 42:12,12 thought 5:4 6:19 8:17 9:4 10:17 22:9 26:9 34:9 34:18 35:4 41:23 42:9,23 46:3 57:9 60:11,15 thousand 47:6 thread 46:16 three 21:10 threshold 43:6 44:23 thrust 42:10 till 27:7 time 19:16 22:5 44:8 50:1 times 48:17 Title 36:10 today's 58:14 tore 37:24 totally 60:9 tow 53:19 town 8:23 transferred 7:17 35:16 38:12 40:23 54:2 transfers 7:13 tried 50:4 55:22 truck 53:19 true 18:2,4 54:2 54:3,4 try 8:25 55:24 trying 5:7 37:25 | 38:2 49:6 51:2 60:17 Tuesday 1:10 turn 11:18 25:13 twice 11:3 17:18 two 16:17 20:11 23:4 30:3 31:3 37:9 38:17 45:12 56:12 Twombly 24:8 type 15:24 16:12 24:5 <hr/> U <hr/> U.S 21:1 unable 56:8 uncertain 55:16 unclear 25:16 unconstitutio... 18:22 20:5,22 22:25 25:14 29:25 34:1,4 37:19 44:16 48:14,15 50:6 understand 7:20 7:20 31:14 50:19 51:17 understanding 29:12 understood 33:21 undisputed 27:12 United 1:1,13,20 2:7 19:22 39:20 45:20 55:21 universe 23:7 unwritten 10:18 use 23:25 24:8 usually 25:15 <hr/> V <hr/> v 1:5 3:4 55:7 versus 43:15 54:19 vetoed 50:8 | view 5:23 6:15 31:23 44:2 45:6,10 48:2 58:2 views 4:8 29:17 31:20 33:11 40:14 44:15 45:21 50:3 53:4,8,18 55:10,18 58:17 58:23,24 59:5 VII 36:10 vindicate 3:22 vindicates 5:25 6:3 violate 13:1,16 14:5,7 15:1 48:8,10 49:16 49:17 violated 14:22 27:23 violates 48:1 violation 11:23 11:25 12:11 13:9,17 15:24 16:5 20:20 40:7 45:10,24 46:1 47:3 50:9 violations 12:16 violent 54:13 virtue 4:1 vote 9:25 50:11 56:21 59:2 60:19 <hr/> W <hr/> waived 11:4 walking 51:23 want 4:18 22:12 24:24 27:20 29:20 31:16 37:14 45:19 47:16,25 48:3 48:6 49:14,25 51:24 56:20 59:24 wants 28:13 | 46:8 Washington 1:9 1:19 wasn't 5:5,16 7:21 8:22 9:9 11:21 15:25 21:11 26:10 36:12,15 41:1 60:13,14 water 18:23,25 Waters 7:25 35:1 46:18 55:7,9 way 4:12 11:20 20:14 25:18 32:10 33:6,15 34:19 35:10,20 38:8 47:17 56:12 59:17 60:10 We'll 3:3 we're 13:23 17:13,13 40:3 43:13 50:13 we've 58:8 Web 38:21 week 47:23 weight 36:13 well-known 45:5 went 8:10,11 17:3,9,19,20 37:23,23 38:2 weren't 34:2 whatsoever 29:22 31:7 wide-ranging 55:16 widespread 53:10 54:24 wishes 3:22 Wittig 10:20 woman 36:10 wondering 47:24 wording 30:15 words 8:24 | 10:23 39:18 worked 10:23 workforce 37:18 works 44:4 world 44:19 46:8 worry 40:15,24 46:6 58:4 wouldn't 22:7 55:10 59:3 write 36:19 wrong 6:16,17 6:23 14:6 29:1 32:10 34:22 wrongful 34:19 <hr/> X <hr/> x 1:2,8 <hr/> Y <hr/> yeah 13:4 14:8 16:20 18:8 22:9 23:21 51:6 yesterday 11:21 <hr/> Z <hr/> 0 <hr/> 1 <hr/> 10:03 1:14 3:2 11:02 61:7 14-1280 1:4 3:4 189 27:11 19 1:10 2:8 1983 12:8,22 13:4,14 <hr/> 2 <hr/> 2016 1:10 29 2:11 <hr/> 3 <hr/> 3 2:4 <hr/> 4 <hr/> 445 21:1 |
|---|---|---|--|---|

| | | | | |
|----------|--|--|--|--|
| 5 | | | | |
| 50 17:8 | | | | |
| 517 21:2 | | | | |
| 59 2:14 | | | | |
| 6 | | | | |
| 7 | | | | |
| 8 | | | | |
| 9 | | | | |